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Attorneys for Defendants
CAMBRIDGE DISPLAY TECHNOLOGY LIMITED
and CDT OXFORD LIMITED

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

SUNNYSIDE DEVELOPMENT
COMPANY LLC,

Plaintiff,

vs.

CAMBRIDGE DISPLAY TECHNOLOGY
LIMITED, CDT OXFORD LIMITED,
OPSYS LIMITED, and JOHN DOES I
through V,

Defendants.

No. C-08-1780-MHP

**REQUEST FOR JUDICIAL NOTICE
IN SUPPORT OF DEFENDANTS
CAMBRIDGE DISPLAY
TECHNOLOGY LIMITED'S AND
CDT OXFORD LIMITED'S
MOTIONS TO DISMISS**

Date: September 8, 2008
Time: 2:00 pm
Courtroom 15, 18th Floor
Hon. Marilyn Hall Patel

Defendant **CAMBRIDGE DISPLAY TECHNOLOGY LIMITED** (“CDT Ltd.”) makes this request for judicial notice in support of its motion to dismiss complaint filed herewith. Defendant **CDT OXFORD LIMITED** (“CDT Oxford”) makes this request for judicial notice in support of its motion to dismiss for lack of personal jurisdiction filed herewith. CDT Ltd. and CDT Oxford join in this one request for judicial notice for the convenience of the Court.

Pursuant to Rule 201 of the Federal Rules of Evidence, CDT Ltd. and CDT Oxford respectfully request that the Court take judicial notice of the documents attached hereto as Exhibits A through W. Exhibits A through V are documents that were filed with the Court in *Sunnyside Development Co. v. Opsys Ltd.*, C-05-553 MHP (N.D. Cal.). Exhibit W is a winding up petition filed January 15, 2008, in proceedings initiated by plaintiff Sunnyside Development Company LLC against Opsys Limited in the United Kingdom. *In the Matter of Opsys Ltd.*, No. 357 of 2008 (High Court of Justice, Companies Court).

Judicial notice may be taken of pleadings filed and orders rendered in other courts. *See, e.g., Burbank-Glendale-Pasadena Airport Auth. v. City of Burbank*, 136 F.3d 1360, 1364 (9th Cir. 1998). “In deciding whether to dismiss a claim under Fed. R. Civ. P. 12(b)(6), a court may look beyond the plaintiff’s complaint to matters of public record.” *Shaw v. Hahn*, 56 F.3d 1128, 1129 n.1 (9th Cir. 1995) (taking judicial notice of district court order in another case).

Exhibit	Page	Document
A	1	Notice of Removal attaching original Complaint for Monetary Damages (<i>Sunnyside I</i> Dkt. 1; filed Feb. 7, 2005)
B	19	Memorandum of Points and Authorities in Opposition to Motion to Dismiss (<i>Sunnyside I</i> Dkt. 14; filed Mar. 21, 2005)
C	33	Memorandum & Order Re: Motion to Dismiss (<i>Sunnyside I</i> Dkt. 20; filed Apr. 22, 2005)
D	40	First Amended Complaint for Monetary Damages (<i>Sunnyside I</i> Dkt. 21; filed May 11, 2005)

Exhibit	Page	Document
E	48	Memorandum of Points and Authorities in Opposition to Motion to Dismiss (<i>Sunnyside I</i> Dkt. 32; filed Jun. 27, 2005)
F	62	Memorandum & Order Re: Defendants' Motion to Dismiss (<i>Sunnyside I</i> Dkt. 39; filed Aug. 8, 2005)
G	73	Notice of Motion and Motion for Leave to File a Second Amended Complaint and/or Join a Related Party as Successor-in-Interest; Memorandum of Points and Authorities in Support Thereof (<i>Sunnyside I</i> Dkt. 48; filed Nov. 2, 2005)
H	89	Memorandum & Order Re: Motion for Leave to File Second Amended Complaint (<i>Sunnyside I</i> Dkt. 57; filed Jan. 4, 2006)
I	98	Defendant Opsys Limited's Discovery Statement (<i>Sunnyside I</i> Dkt. 68; filed Oct. 26, 2006)
J	100	Plaintiff Sunnyside Development Company LLC's Discovery Statement (<i>Sunnyside I</i> Dkt. 69; filed Oct. 26, 2006)
K	102	Civil Pretrial Minutes [Telephonic Discovery Hearing] (<i>Sunnyside I</i> Dkt. 70; filed Oct. 27, 2006)
L	103	Verdict Form (<i>Sunnyside I</i> Dkt. 166; filed Mar. 12, 2007)
M	105	Plaintiff's Notice of Motion and Motion for Attorney's Fees Pursuant to the Parties' Contracts and Motion to Add Cambridge Display Technology, Inc. as a Party to Action and Judgment (<i>Sunnyside I</i> Dkt. 179; filed Apr. 2, 2007)
N	136	Declaration of Paul R. Ainslie re Motion to Add Cambridge Display Technology, Inc. as a Party to Action and Judgment (<i>Sunnyside I</i> Dkt. 180; filed Apr. 2, 2007) [exhibits omitted]
O	141	Declaration of Robert H. Bunzel re Motion to Add Cambridge Display Technology, Inc. as a Party to Action and Judgment, Exhibit M (<i>Sunnyside I</i> Dkts. 182 & 185-3, filed Apr. 2, 2007)
P	175	Declaration of Michael Black in Opposition to Plaintiff's Motion to Add Cambridge Display Technology, Inc. as a Party to Action and Judgment (<i>Sunnyside I</i> Dkt. 204; filed May 7, 2007) [exhibits omitted]
Q	185	Declaration of David Fyfe in Opposition to Plaintiff's Motion to Add Cambridge Display Technology, Inc. as a Party to Action and Judgment (<i>Sunnyside I</i> Dkt. 205; filed May 7, 2007)
R	190	Declaration of Alice K. M. Hayashi in Opposition to Plaintiff's Motion to Add Cambridge Display Technology, Inc. as a Party to Action and Judgment (<i>Sunnyside I</i> Dkt. 206; filed May 7, 2007)

Exhibit	Page	Document
S	206	Opposition of Cambridge Technology, Inc. to Plaintiff's Motion to Add Cambridge Display Technology, Inc. as a Party to Action and Judgment (<i>Sunnyside I</i> Dkt. 207; filed May 7, 2007)
T	235	Judgment (Fed. R. Civ. P. 58) (<i>Sunnyside I</i> Dkt. 213; filed May 29, 2007)
U	236	Transcript of Proceedings (<i>Sunnyside I</i> Dkt. 218; hearing held May 16, 2007)
V	309	Memorandum & Order Re: Plaintiff's Motion to Add Cambridge Display Technology, Inc. as a Party to Action and Judgment (<i>Sunnyside I</i> Dkt. 224; filed Aug. 29, 2007)
W	327	Winding Up Petition filed Jan. 15, 2008; <i>In the Matter of Opsys Ltd.</i> , No. 357 of 2008 (High Court of Justice, Companies Court)

Dated: July 28, 2008.

PILLSBURY WINTHROP SHAW PITTMAN LLP
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 ELIANA P. KAIMOWITZ RODRIGUEZ
 50 Fremont Street
 Post Office Box 7880
 San Francisco, CA 94120-7880

By /s/ Alice Kwong Ma Hayashi

Alice Kwong Ma Hayashi
 Attorneys for Defendants
 CAMBRIDGE DISPLAY TECHNOLOGY
 LIMITED and CDT OXFORD LIMITED

Exhibits A-C to Request for Judicial Notice

EXHIBIT A

1 JAMES E. BURNS, JR. (STATE BAR NO. 53250)
2 JUSTIN MYER LICHTERMAN (STATE BAR NO. 225734)
3 ORRICK, HERRINGTON & SUTCLIFFE LLP
4 The Orrick Building
5 405 Howard Street
6 San Francisco, CA 94105-2669
7 Telephone: 415-773-5700
8 Facsimile: 415-773-5759

9 Attorneys for Defendants
10 OPSYS LIMITED, a United Kingdom Company,
11 CDT LIMITED, a UK Company

12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA
14 SAN FRANCISCO DIVISION

15 SUNNYSIDE DEVELOPMENT
16 COMPANY, LLC,

17 Plaintiff,

18 v.

19 OPSYS LIMITED, a United Kingdom
20 Company, CDT LIMITED, a UK Company,

21 Defendant.

22 **C 05 00553**

23 NOTICE OF REMOVAL
24 (28 U.S.C. § 1441(a))

1 To the Clerk of the Court, plaintiff Sunnyside Development Company, LLC
2 ("Sunnyside"), and plaintiff's attorney of record:

3 PLEASE TAKE NOTICE THAT defendants Opsys Limited ("Opsys") and Cambridge
4 Display Technology, Limited. ("CDT") hereby remove this action from the Superior Court of
5 California for the County of Alameda to this Court based on the following facts:

6 1. On December 14, 2004, an action was commenced in the Superior Court of the
7 State of California in and for the County of Alameda, entitled *Sunnyside Development Company,*
8 *LLC, Plaintiffs, vs. Opsys Limited, a United Kingdom Company and CDT Limited, a UK*
9 *Company, Defendants*, as case number HG 04-189362.

10 2. The first date upon which defendants Opsys and CDT received a copy of the said
11 complaint was January 10, 2005, when defendants were served with a copy of the said complaint
12 and a summons from the said state court. True and correct copies of the summons and complaint
13 are attached hereto as Exhibit A. The allegations of the complaint are incorporated by reference in
14 this notice without admitting the truth of any of them.

15 JURISDICTION

16 3. This action is a civil action of which this Court has original jurisdiction under 28
17 U.S.C. section 1441(a), and is one that may be removed to this Court by defendants pursuant to
18 28 U.S.C. section 1332(a) in that it is a civil action between a citizen of a State and citizens or
19 subjects of a foreign state, and the amount in controversy exceeds \$75,000, exclusive of interest
20 and costs.

21 4. Defendants are informed and believe that plaintiff Sunnyside was, and still is, a
22 citizen of the State of California. Defendant Opsys was, at the time of the filing of this action,
23 and still is a private corporation incorporated under the laws of the United Kingdom, its principle
24 place of business in Oxford in the United Kingdom. Defendant CDT was, at the time of the filing
25 of this action, and still is a corporation incorporated under the laws of the United Kingdom with
26 its principle place of business in Cambridge, England in the United Kingdom. Opsys and CDT
27 are the only defendants that have been served summons and complaint in this action.
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Justin M. Lichterman.
Attorneys for Defendants
OPSYS LIMITED, a United Kingdom Company,
CDT LIMITED, a UK Company

Exhibit A

COPY FOR SERVICE

SEP 2005 167

SUMMARY OF THE DOCUMENT TO BE SERVED
ELEMENTS ESSENTIELS DE L'ACTE

Convention on the service abroad of judicial and extrajudicial documents in civil or commercial matters, signed at The Hague, November 15, 1965.

Convention relative à la signification et à la notification des actes judiciaires et extrajudiciaires en matière civile ou commerciale, signée à La Haye, le 15 Novembre 1965.

(article 5, fourth paragraph)
 (article 5, alinea 4)

Name and address of the requesting authority:
 Nom et adresse de l'autorité requérante:

Stanley G. Hilton, SBN 65930, 2570 North First Street, Suite 200, San Jose, CA 95131, USA

Particulars of the parties:

Identité des parties:

Sunnyside Development Company, LLC v. CDT Ltd., & Opsys Ltd.

JUDICIAL DOCUMENT
ACTE JUDICIAIRE

Nature and purpose of the document:

Nature et objet de l'acte:

Summons / Complaint for Monetary Damages

Nature and purpose of the proceedings and, where appropriate, the amount in dispute:

Nature et objet de l'instance le cas échéant le montant du litige:

Breach of Contract, Fraud

Date and place for entering appearance:

Date et lieu de la comparution:

Within 20 Days, California Superior Court for Alameda County, 24403 Amador St., Hayward, California 94344, USA

Court which has given judgment**:

Jurisdiction qui a rendu la décision:

Date of judgment**:

Date de la décision:

Time limits stated in the document**:

Indication des délais figurant dans l'acte:

20 calendar days from service

EXTRAJUDICIAL DOCUMENT
ACTE EXTRAJUDICIAIRE

Nature and purpose of the document:

Nature et objet l'acte:

Time limits stated in the document**:

Indication des délais figurant dans l'acte:

SUMMONS (CITACION JUDICIAL)

NOTICE TO DEFENDANT:

(AVISO AL DEMANDADO):

Opsys Limited, a United Kingdom Company,
COT Limited, a UK Company

YOU ARE BEING SUED BY PLAINTIFF:

(LO ESTA DEMANDANDO EL DEMANDANTE):

SunnySide Development Company,
LLC

You have 30 CALENDAR DAYS after this summons and legal papers are served on you to file a written response at this court and have a copy served on the plaintiff. A later or phone call will not protect you. Your written response must be in proper legal form. If you want the court to hear your case, there may be a court form that you can use for your response. You can find these court forms and more information at the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), your county law library, or the courthouse nearest you. If you cannot pay the filing fee, ask the court clerk for a fee waiver form. If you do not file your response on time, you may lose the case by default, and your wages, money, and property may be taken without further warning from the court.

There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may want to call an attorney referral service. If you cannot afford an attorney, you may be eligible for free legal services from a nonprofit legal services program. You can locate these nonprofit groups at the California Legal Services Web site (www.legalaidcalifornia.org), the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), or by contacting your local court or county bar association.

Tienes 30 días de calendario después de que le entreguen esta citación y papeles legales para presentar una respuesta por escrito en esta corte y hacer que se entregue una copia al demandante. Una carta o una llamada telefónica no lo protegen. Su respuesta por escrito tiene que estar en forma legal correcta al tiempo que presenten su caso en la corte. En internet hay un formulario que usted puede usar para su respuesta. Puede encontrar estos formularios de la corte y más información en el Centro de Ayuda de las Cortes de California (www.courtinfo.ca.gov/selfhelp), en la biblioteca de leyes de su condado o en la corte que le quisiere más cerca. Si no puede pagar la cuota de presentación, pida al secretario de la corte que le dé un formulario de solicitud de pago de cuotas. Si no presenta su respuesta a tiempo, puede perder el caso por incumplimiento y la corte le podrá quitar su sueldo, dinero y bienes sin más advertencia.

Hay otras requisitos legales. Es recomendable que llame a un abogado inmediatamente. Si no conoce a un abogado, puede llamar a un servicio de comisión a abogados. Si no puede pagar a un abogado, es posible que califique con los requisitos para obtener servicios legales gratuitos de un programa de servicios legales sin fines de lucro. Puede encontrar estos grupos sin fines de lucro en el sitio web de California Legal Services (www.legalaidcalifornia.org), en el Centro de Ayuda de las Cortes de California (www.courtinfo.ca.gov/selfhelp) o poniéndole su condado con la corte o el colegio de abogados locales.

The name and address of the court is:

(El nombre y dirección de la corte es)

SUPERIOR COURT OF CALIF. Alameda County
24405 - Alameda St

Hayward, CA 94544 USA

The name, address, and telephone number of plaintiff's attorney, or plaintiff without an attorney, is:

(El nombre, la dirección y el número de teléfono del abogado del demandante, o del demandante que no tiene abogado, es)

DEC 14 2004

SG HILTON

PO BOX 27575

DATE

(Fecha)

SAN FRANCISCO, CA 94127

Clerk by

(Secretario)

Deputy

(Adjunto)

For proof of service of this summons, use Proof of Service of Summons (form POS-010).

(Para probar de entrega de esta citación use el formulario Proof of Service of Summons (POS-010))



NOTICE TO THE PERSON SERVED: You are served

- 1 ☐ as an individual defendant
2 ☐ as the person sued under the fictitious name of (specify)

☐ on behalf of (specify)

under ☐ CCP 416.10 (corporation)

☐ CCP 416.20 (limited liability corporation)

☐ CCP 416.40 (association or partnership)

☐ other (specify)

4 ☐ by personal delivery on (date)

☐ CCP 416.50 (minor)

☐ CCP 416.70 (conservator)

☐ CCP 416.90 (authorized person)

Print Name of Plaintiff or
Judge: Susan H. Hilton
2004 (Rev. January 1, 2004)

SUMMONS

Page 1 of 1

2004 (Rev. January 1, 2004)

Alameda County
www.courtinfo.ca.gov

P. 2

101-141572-0000

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DEC-18-2004 23:05 REC'D: 18-2004-00000

1 STANLEY G. HILTON, BAR NO. 65990
 2 LAW OFFICES OF STANLEY G. HILTON
 2570 NORTH FIRST ST., SUITE 200
 3 SAN JOSE, CA 95131
 Tel: (415) 378-6142
 4 Fax: (415) 276-2388
 Attorney for Plaintiff
 5 SUNNYSIDE DEVELOPMENT CO., LLC

ENDORSED
 FILED
 ALAMEDA COUNTY

DEC 14 2004

CLERK OF THE SUPERIOR COURT
 By DEBRA FURTADO
 Deputy

6
 7 SUPERIOR COURT OF CALIFORNIA, ALAMEDA COUNTY
 8 SOUTHERN DIVISION (HAYWARD), UNLIMITED JURISDICTION
 9

10
 11 No. HC 04-189362

12 SUNNYSIDE DEVELOPMENT
 COMPANY, LLC

13)
 14 COMPLAINT FOR MONETARY
 DAMAGES

15 v.
 16 Opsys Limited, a United Kingdom Company,
 CDT LIMITED, A UK COMPANY,
 Defendants.

17)
 JURY TRIAL DEMANDED

18 FIRST CAUSE OF ACTION: BREACH OF CONTRACT (LEASE AGREEMENT)

19 1. Plaintiff is a Limited Liability Company headquartered in Saratoga, CA and doing
 20 business in California.

21 2. Defendant Opsys Limited, a United Kingdom company, is a British company
 22 headquartered in England, which does business in California and has had offices in this district in
 23 Fremont, CA. It is owned by defendant CDT, also a British company. Defendant signed a lease
 24 agreement yielding to the personal jurisdiction of this court and thus agreed to be sued here.

25 3. JURY TRIAL DEMANDED: Plaintiff DEMANDS A JURY TRIAL IN THIS
 26 CASE.

27 6. VENUE: Venue is proper here because all actions occurred in Fremont, CA in this
 28

COMPLAINT
 SUNNYSIDE VS OPSYS

1

1 court's jurisdiction.

2 7. **JURISDICTION:** This court has jurisdiction over this whole case as plaintiff's
3 damages demand exceeds the jurisdictional minimum and is in fact over \$ 10 million.
4 has supplemental jurisdiction of all the state torts herein, because they all arose out of the same
5 operative nucleus of facts as the federal claim. All defendants have "minimum contacts" in
6 California and in this county, as they do business here and have had offices and facilities in this
7 district, in Fremont, CA, during all times mentioned.

8 8. On or about February 15, 2001 plaintiff and defendant signed a single tenant lease
9 contract for seven years and three months (from May 1, 2001 through April 30, 2008, for rental of
10 space at 47375 Fremont Blvd., in Fremont, CA. Under the terms of this contract, defendant also
11 agreed to make certain capital improvements on the property, as consideration for the leased.
12 Defendant agreed to pay plaintiff a monthly base rent. The contract provides that defendant agreed
13 to be sued in this court and also provides that attorney fees and costs must be awarded to the
14 prevailing party in a lawsuit brought by plaintiff to enforce the lease, or for breach of contract
15 and fraud. As part of the terms and conditions of the lease, defendant agreed to pay all its bills to
16 all creditors and agreed not to allow a mechanics lien or other type of lien to be placed on the
17 property for its failure to pay money due creditors, and defendant also agreed that it would
18 conduct business in an environmentally safe manner complying with environmental laws of the
19 US and California and Alameda County. Defendant promised to maintain its premises in a clean
20 and environmentally safe manner. The agreement provided that if defendant defaulted or broke
21 the lease, and plaintiff sued and prevailed, plaintiff would be entitled to an award of attorney fees
22 and costs.

23 9. On or about May 1, 2001, the parties began performance on the lease. Defendant
24 moved into the premises and set up operations there, brought equipment and supplies and
25 personnel there, and proceeded to perform work in the high technology area.

26 10. Plaintiff performed all conditions under the lease contract and remained ready to
27 perform.
28

COMPLAINT
SUNNYSIDE VS OPSYS

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Page 8

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1 11. On or about November 2002, defendant materially breached the lease by refusing to
2 pay rent. The last rent payment was received on or about October 2002. Defendant further
3 breached the lease agreement in or about October 2002 by failing to pay its debts to certain
4 contractors, who placed three mechanics liens on the property. Defendant further materially
5 breached the lease contract by conducting operations in an environmentally unsafe manner, in
6 violation of the laws, including hazardous and improper disposal of chemicals and other
7 hazardous substances.

8 12. As a proximate result of the above acts of Defendant, plaintiff has suffered loss of
9 approximately over \$ 5 million in rental income, and has incurred further costs to pay off the three
10 liens on the property, and has incurred further costs and fines and penalties to remediate and clean
11 up the toxic contamination caused by defendant, and has incurred attorney fees and litigation costs
12 to bring this suit. The amount of damages in total exceeds \$ 10 million. The environmental
13 contamination made it impossible for plaintiff to use or rent the property until approximately
14 September 2004, and plaintiff has not been able to find a tenant yet. Plaintiff has also been
15 damaged in losing the net increased value of the property which should have accrued if defendant
16 had performed as promised and had made the capital improvements it had promised.

17 13. As a further proximate result of defendant's material breach of lease contract, plaintiff
18 has incurred attorney fees and costs to bring this action as well as other attorney fees and costs, to
19 try to persuade defendant to meet its obligations, in an amount according to proof.

20
21 WHEREFORE, Counter claimant prays for judgment against defendants, and each of
22 them, as hereinafter set forth.

23 **SECOND CAUSE OF ACTION**

24 **(FRAUD)**

25 14. Plaintiff realleges and incorporates by reference, paragraphs 1 through 13 above, and
26 incorporates them herein by reference as if fully set forth herein.

27 15. On or about February 15, 2001, defendant by its officers and agents Gary Rhea (CFO)

28
COMPLAINT

SUNNYSIDE VS ORSYS

1 Of Opsys) and Michael Holmes (CEO of Opsys) and other officials of defendant made materially
2 false representations to plaintiff in order to induce plaintiff to lease the property to them. These
3 misrepresentations included, *inter alia*, a promise that defendant would pay its rent every month
4 for the entire period of the lease, from May 1 2001 through April 30 2008. They also told plaintiff
5 that defendant would make additions and capital improvements to the property, during the lease
6 period, to improve the value of the property, and they promised not to violate any environmental al
7 laws and they promised not to incur any mechanics liens on the property.

8 16. Plaintiff believed the representations of defendants described in the preceding
9 paragraph, and relied on them to its detriment, in that it entered into the lease agreement that is the
10 subject of this action.

11 17. As a proximate result of the above acts of Defendant, plaintiff has suffered loss of
12 approximately over \$ 5 million in rental income, and has incurred further costs to pay off the three
13 liens on the property, and has incurred further costs and fines and penalties to remediate and clean
14 up the toxic contamination caused by defendant. The amount of damages in total exceeds \$ 10
15 million. The environmental contamination made it impossible for plaintiff to use or rent the
16 property until approximately September 2004, and plaintiff has not been able to find a tenant yet.
17 Plaintiff has also been damaged in losing the net increased value of the property which should
18 have accrued if defendant had performed as promised and had made the capital improvements it
19 had promised.

20 18. As a further proximate result of defendant's material breach of lease contract, plaintiff
21 has incurred attorney fees and costs to bring this action as well as other attorney fees and costs, to
22 try to persuade defendant to meet its obligations, in an amount according to proof.

23 19. The actions of defendant were malicious, outrageous, wanton and oppressive in
24 defrauding plaintiff, and plaintiff is entitled to an award of punitive damages of \$ 25 million,
25 against defendant.

26
27 WHEREFORE, Counter claimant prays for judgment against defendants, and each of
28

COMPLAINT
SUNNYSIDE VS OPSYS

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1 them, as hereinafter set forth.

9 **PRAYER FOR RELIEF**

10 WHEREFORE, plaintiff prays for judgment against the defendant as follows:

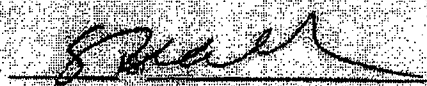
- 11 1. For unpaid rent in an amount according to proof;
- 12 2. For loss of value of the increased value of the property in an amount according to
- 13 proof;
- 14 3. For costs of plaintiff having to pay off the three mechanics liens in an amount
- 15 according to proof;
- 16 4. For costs of plaintiff having to pay money to remediate the toxic and
- 17 environmental damage done by plaintiff, and fines and penalties in an amount according to proof;
- 18 5. For punitive damages of \$ 25 million to punish defendants for its wrongful conduct
- 19 and set an example for others;
- 20 6. For interest on the sum of damages awarded, calculated from May 1, 2001 to the
- 21 date of judgment;
- 22 7. For reasonable attorney's fees and litigation costs pursuant to the lease agreement;
- 23 8. For costs of suit herein incurred; and
- 24 9. For such other and further relief as this Court deems fair, just and equitable.

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26 Dated: December 9, 2004

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COMPLAINT
SUNNYSIDE VS OPSYS

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Stanley G. Hilton
Attorney for Plaintiff

COMPLAINT
SUNNYSIDE VS OPSYS

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B'd

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50422 1002-81-030

ASSIGNMENT OF LEASE AND CONSENT OF LESSOR

THIS ASSIGNMENT OF LEASE AND CONSENT OF LESSOR ("Assignment") is made and entered into as of October 22, 2002, by and among OPSYS LIMITED, a United Kingdom company ("Assignor"), OPSYS US CORPORATION, a Delaware corporation ("Assignee"), and SUNNYSIDE DEVELOPMENT COMPANY, LLC ("Lessor"), on the basis of the following facts and understandings.

WHEREAS, Lessor and Assignor as the lessee entered into a certain lease dated February 15, 2001, and amended by that certain Amendment No. 1 thereto dated September 1, 2002 (hereinafter collectively "Lease"), for that certain premises commonly known as 47375 Fremont Blvd., Fremont, California. A true and correct copy of the Lease is attached hereto as Exhibit A and made a part hereof. All capitalized terms not defined herein shall have the same meaning as used in the Lease.

WHEREAS, Assignor desires to assign the Lease to Assignee, and Assignee desires to acquire the Lease from Assignor, on the terms and conditions set forth herein.

NOW, THEREFORE, in consideration of the foregoing premises and for other good and valuable consideration, the receipt and sufficiency of which is acknowledged by each of the parties, the parties agree as follows:

1. *Assignment of Lease.* Assignor hereby assigns and transfers to Assignee, and Assignee hereby accepts the assignment of, all right, title and interest of Assignor in and to the Lease, including without limitation any right to the cash portion of the Security Deposit remaining following consummation of this Assignment.

2. *Effective Date.* The effective date of this assignment shall be the date on which all conditions precedent to Lessor's consent to this assignment as set forth in Paragraph 6 below have been satisfied ("Effective Date"). In the event not all of said conditions precedent have been satisfied by ninety (90) days after the date first written above, this assignment shall automatically be null and void and of no force or effect whatsoever.

3. *Assumption of Assignor's Obligations Under Lease.* Assignee agrees to assume, perform and be bound by each and every obligation of the Assignor under the Lease, including not only those arising after the Effective Date but also those obligations currently existing, whether contingent, executory, liquidated, or otherwise. Assignee specifically acknowledges that these obligations include (a) the removal and surrender/restoration obligations in connection with the Alterations, Utility Installations and Trade Fixtures heretofore made by Assignor to the Premises as required by the Lease, and (b) the obligations under Paragraph 6.2 of the Lease with respect to Hazardous Substances in, on or around the Premises for which Assignor is responsible under the terms of the Lease. Assignee acknowledges that it has read and understands the Lease and the obligations created there under. Assignee represents and warrants that it has inspected the Premises and accepts the Premises in "as is, where is" condition.

4. *Representations of Assignor.* Assignor represents and warrants to Assignee and Lessor, which representations and warranties shall be deemed renmade as of the Effective Date, that:

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a. A true and correct copy of the Lease and any and all addenda, supplements, amendments and modifications thereof are attached hereto as Exhibit A;

b. The Lease is in full force and effect according to the terms thereof;

c. Assignor has not previously assigned or transferred any of its right, title or interest in, to or under the Lease and it holds such right, title and interest free and clear of any liens, claims or encumbrances;

d. As of the Effective Date, (i) Assignor is current in the payment of all rent and other amounts due under the Lease, including without limitation, amounts due in respect of taxes, utilities and insurance, and Assignor is not in default of any of its obligations there under, nor has any event or condition occurred which, with notice or lapse of time, would mature into a default under the Lease; and, (ii) to its knowledge there are no claims, rights or actions that have accrued or could be asserted by Assignor against Lessor for any default, breach or violation by Lessor under the Lease. Nothing contained herein shall be construed as a waiver by Lessor of any rights that it may have for any default, breach or violation of any term or provision of the Lease prior to the Effective Date by Assignor or by Assignee of any of Lessors' obligations or representations under the Lease.

5. *Indemnity.* Assignor agrees to indemnify Assignee and hold it harmless against any and all claims, demands, actions or causes of action arising out of or relating to any purported breach of the Lease by Assignor prior to the Effective Date, including without limitation reasonable attorneys' fees incurred by Assignee in defending there against.

6. *Lessor's Consent to Assignment.* Lessor hereby consents to this Assignment on the condition that not later than ninety (90) days after the date first written above:

a. Lessor and Assignee execute that certain proposed Amendment No. 2 to Lease, a copy of which is attached hereto as Exhibit B and made a part hereof;

b. Assignee deposits with Lessor the required letter of credit portion of the Security Deposit as described more fully in Paragraph 1(c) of said Amendment No. 2;

c. A pollution liability insurance policy described in Paragraph 3 of said Amendment No. 2 or a binder for each policy in form reasonably acceptable to Lessor is procured by Lessee and delivered to Lessor;

d. Lessor's attorney's fees incurred in connection with this Assignment in the amount of not greater than Ten Thousand Dollars (\$10,000) are reimbursed by Assignee to Lessor as provided under Paragraph 36 of the Lease.

In the event all of the foregoing conditions are not fully satisfied by ninety (90) days after the date first written above, Lessor's foregoing consent shall automatically be null and void and of no force or effect whatsoever.

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7. *Release of Assignor.* In consideration of payment to Lessor of the sum of Fifty Thousand Dollars (\$50,000) on the Effective Date, Lessor agrees to release Assignor irrevocably and unconditionally from any and all liability and obligation under the Lease and/or arising in connection with the Premises and from all claims and demands it may have against the Assignor arising pursuant to the Lease and/or in connection with the Premises, all conditioned on this Assignment becoming fully effective and unconditional. Said consideration shall be paid by Assignor to Lessor by Lessor retaining said sum from the cash portion of the Security Deposit, effective as of the Effective Date which shall reduce the cash portion of the Security Deposit by that amount to Two Hundred Fifty Thousand Dollars (\$250,000).

8. *Miscellaneous.*

a. *Notices:* Any notice, consent, demand or other communication required or permitted hereunder must be in writing to be effective and shall be deemed delivered and received (i) if personally delivered including by a nationally recognized overnight delivery service such as FedEx, or (ii) if delivered by mail, when received, each addressed as follows:

If to Assignee:

Opsys US Corporation
47375 Fremont Blvd.
Fremont, CA 94539

If to Assignor:

Opsys Limited
B. LEGG, BROKE BUSINESS & GENERAL MGR
SANDY LANE, WAREHOUT
OYE62B OX5 IPF
UK

If to Lessor:

Sunnyside Development Company, LLC
c/o Law Office of James Bow
220 Montgomery Street, Suite 343
San Francisco, CA 94104

(or such other address as any party shall specify by written notice so given).

b. Time is of the essence of this Assignment. The parties acknowledge that they have mutually bargained for this provision, and would not have entered into this Assignment in the absence of this provision.

c. This Assignment shall be construed in accordance with the laws of the State of California.

d. This Assignment, the Lease and such documents as are executed in connection therewith contain the entire agreement of the parties with respect to the subject matter hereof, and this Assignment shall not be varied, amended, or superseded except by written agreement between all of the parties to this Agreement. So long as this Assignment is effective, the Lease may be varied, amended, or superseded by the written agreement of Lessor and Assignee without the approval of Assignor.

e. This Assignment may be executed in counterparts, each of which shall be an original and all of which when taken together shall be deemed to constitute one and the same instrument.

f. In the event an action is initiated to interpret or enforce any of the terms of this Assignment or enforce any judgment, the prevailing party shall be entitled to receive from the other party reasonable attorneys' fees, costs, and expenses incurred in the action.

g. The validity of this Assignment is conditioned upon the execution and delivery of the Assignment by all of the parties hereto, including the Lessor.

h. In the event any one or more of the provisions contained in this Assignment are held to be invalid, illegal, or unenforceable in any respect, such invalidity, illegality, or unenforceability shall not affect any other provision hereof, and this Assignment shall be construed as if such invalid, illegal, or unenforceable provision had not been contained herein.

i. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their successors and assigns.

IN WITNESS WHEREOF, the parties have executed this Assignment as of the day and year above written.

ASSIGNOR

ASSIGNEE

OPSYS LIMITED,
a United Kingdom company

OPSYS US CORPORATION,
a Delaware corporation

By

Alexis Z...

Its Chief Financial Officer

By

Dan Rodin

Its Chief Operating Officer

LESSOR

SUNNYSIDE DEVELOPMENT COMPANY, LLC

By

Richard Lee

Its Manager

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AMENDMENT NO. 1 TO LEASE
47575 Fremont Blvd., Fremont, CA

THIS AMENDMENT NO. 1 TO LEASE is made as of September 1, 2002, by and between SUNNYSIDE DEVELOPMENT COMPANY, LLC (hereinafter "Lessor"), and OPSYS LIMITED, a United Kingdom company (hereinafter "Lessee"), on the basis of the following facts and understandings.

WHEREAS, Lessor and Lessee entered into a certain lease dated February 15, 2001 (hereinafter "Lease"), for that certain premises commonly known as 47575 Fremont Blvd., Fremont, California (hereinafter "Premises"). The provisions of the Lease are incorporated herein and made a part hereof, including but not limited to the definitions of the capitalized terms as used herein.

WHEREAS, Lessor and Lessee are desirous of setting forth certain acknowledgements and of amending the Lease, all as set forth more fully below.

NOW, THEREFORE, the parties hereto agree to amend the Lease as follows:

1. *Business Park Expenses.* The parties hereto acknowledge that the Premises, which includes the parcel of land on which the demised building is situated, is part of the Bay Side Business Park complex ("Complex"), and that there are certain common area operating expenses in connection with the Complex assessed to the various owners (including Lessor) of the parcels of land situated in the Complex pursuant to the CC&Rs recorded for the Complex. The parties hereto further acknowledge and agree that, except as set forth herein to the contrary, Lessee is obligated to reimburse to Lessor on demand all such common area operating expenses incurred during the term of the Lease which are usual and customary as additional rent under the Lease, which expenses shall be subject to audit under Paragraph 64 of the Lease.

2. *Alterations, Utility Installations, and Trade Fixtures.* Lessee hereby acknowledges that Lessee has heretofore made certain Alterations, Utility Installations and Trade Fixtures to the Premises without requesting Lessor's written consent to same. The parties hereto acknowledge and agree that the provisions of Paragraph 7.4 of the Lease, and not those of Paragraph 5.5 of the Lease, shall govern the ownership, removal, and surrender/restoration rights and obligations in connection with such Alterations, Utility Installations and Trade Fixtures. Lessor agrees not to require the removal of any of such Alterations, Utility Installations or Trade Fixtures prior to the expiration or earlier termination of the Lease.

3. *Hazardous Substances.* Lessee hereby acknowledges that Lessee has heretofore engaged in activities in or on the Premises which constitute Reportable Uses of Hazardous Substances without obtaining the express prior written consent of Lessor for such Reportable Uses. Lessee agrees to promptly comply with all provisions of the Lease applicable to such prior Reportable Uses, and Lessor agrees to defer any breach claim so long as Lessee diligently completes its compliance obligations.

4. Security Deposit.

a. In reference to Paragraph 50 of the Lease, the parties hereto agree that the Letter of Credit shall (i) be in the form of an irrevocable standby letter of credit, (ii) permit multiple draws, (iii) be for a term of not less than one year, (iv) provide for presentation at the issuing bank's office in either Oakland, San Francisco or Los Angeles, California, and (v) provide for automatic term extension of not less than one year unless the issuer gives written notice to Lessor not less than forty-five (45) days prior to the expiration date that the Letter of Credit will not be extended beyond that expiration date. In the event such notice is given by the issuer, Lessee shall deposit with Lessor not later than thirty (30) days prior to said expiration date a replacement letter of credit complying with the applicable requirements for a term commencing immediately following said expiration date and issued either by Bank of America or, subject to Lessor's prior written approval, another commercial bank of reasonably sufficient financial creditworthiness. Notwithstanding any provision to the contrary in Paragraph 50 of the Lease and for purposes of determining Lessor's right to draw under the then existing letter of credit, the failure of Lessee to timely deposit with Lessor the required replacement letter of credit shall automatically constitute a default under the Lease with no applicable notice and cure period, and entitle Lessor, without the necessity of providing Lessee with any notice or cure period and in addition to all other remedies available to Lessor for such default, to draw the then remaining balance under the then existing remaining letter of credit and to hold such proceeds on account of the damages which Lessor has incurred or will incur in connection with Lessee's failure to provide a portion of the Security Deposit in the form of the required letter of credit.

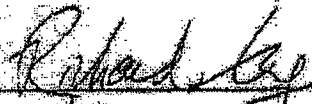

b. In the event Lessor should use, apply or retain all or any part of the Security Deposit (whether the cash portion or the Letter of Credit or both), Lessee shall within five (5) business days after written request therefor restore the Security Deposit to the full amounts and in the forms required by this Lease.

The foregoing amendments to the Lease shall be effective as of the date first written above. Except as so amended, all other provisions of the Lease shall remain in full force and effect.

IN WITNESS WHEREOF, the parties hereto have executed this Amendment No. 1 to Lease as of the date first written above.

LESSOR

SUNNYSIDE DEVELOPMENT COMPANY, LLC

By 
 Its 

LESSEE

ORPSYS LIMITED, a United Kingdom company

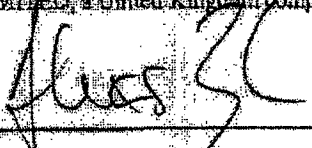
By 
 Its CHIEF FINANCIAL OFFICER

EXHIBIT B

1 LAW OFFICES OF STANLEY G. HILTON
Stanley G. Hilton, SBN #65990
2 580 California Street, Suite 500
San Francisco, CA 94104
3 Telephone: (415) 378-6142
Fax: (650) 558-1231
4
5 Attorney for Plaintiff
SUNNYSIDE DEVELOPMENT COMPANY, LLC

6
7 UNITED STATES DISTRICT COURT
8 NORTHERN DISTRICT OF CALIFORNIA
9

10	SUNNYSIDE DEVELOPMENT)	Case No.: C-05-00553 MHP
11	COMPANY, LLC,)	
12	Plaintiff,)	MEMORANDUM OF POINTS AND
13	v.)	AUTHORITIES IN OPPOSITION TO
14	OPSYS LIMITED, a United Kingdom)	MOTION TO DISMISS
15	Company, CDT LIMITED, a UK Company,)	
16	Defendants.)	Date: April 11, 2005
)	Time: 2:00 p.m.
)	Courtroom: 15, 18 th Floor
)	Honorable Marilyn Hall Patel
)	United States District Judge

1 I. INTRODUCTION

2 At this juncture in the proceedings defendants seek dismissal or summary judgment
3 without having answered the complaint. The defendants describe this as a frivolous action and an
4 opportunistic attempt to extort monies from defendants. Such baseless hyperbole is a further
5 evidence of the fraud that defendants have attempted to perpetrate upon plaintiff. That defendants
6 should bring in declarations and unexecuted contracts to dismiss this claim without giving plaintiff
7 a chance to perform the discovery that would substantiate its case is abusive in the extreme.

8 Defendants claim that plaintiff consented to the assignment of the lease contract in
9 question to another company. It is true that the plaintiff considered the assignment of the lease
10 agreement, but that assignment was never completed and by its own terms plaintiff never
11 consented to it.

12 In fact, it is the attempt to manipulate such an assignment to plaintiff's detriment that is of
13 the essence of the fraud that was perpetrated by defendants against plaintiff. Plaintiff was led to
14 believe that the Assignment of Lease and Consent of Lessor ("Assignment") that had been
15 negotiated would be completed and become effective. Such Assignment never became effective.

16 By arguing that the Assignment is a bar to recovery and moving for dismissal on that basis,
17 defendants seem to be admitting that absent such an assignment, the original lease would be
18 breached. But the Assignment was never effective. The defendants have breached the original
19 lease agreement and defrauded plaintiff by contending that the conditions to assign the lease to a
20 successor in interest would be met. Such conditions were never met and it is clear that the tender
21 of such Assignment was merely a device and subterfuge to avoid the defendants' liabilities under
22 the contract.

23 CDT Limited has purchased the assets of Opsys Limited. Plaintiff Sunnyside
24 Development Company needs to do discovery to determine which of the defendants are liable or if
25 they are jointly and severably liable.

26 Modern federal rules of pleading allow a complaint to stand if it can prevail on any theory
27 assuming the facts pled are true. The plaintiff in this action has plainly met that burden and the
28 motion for dismissal must be rejected. Equally the contention of a motion for summary judgment

1 is inapplicable and defendants should be required to answer the complaint.

2 If this Court finds any defects in the complaint, plaintiff requests leave to amend the
3 complaint to cure those defects.

4 If this Court converts this motion into a motion for summary judgment under Federal Rules
5 of Civil Procedure, Rule 56, plaintiff invokes Rule 56(f) and hereby requests at least six months to
6 conduct the necessary discovery to oppose a summary judgment motion consistent with the
7 discovery plan in the declaration of Stanley Hilton attached hereto.

8 II. STATEMENT OF FACTS

9 This is a suit that involves the redress of a very direct breach of contract and fraud.

10 In 2001, the defendant Opsys Limited executed a lease agreement with plaintiff for the
11 premises known as 47375 Fremont Boulevard in Fremont California.

12 As the property manager for Sunnyside Development Company, Frank Chui was the
13 representative of the plaintiff during all of the events described in this lawsuit from on or about
14 March 2002, through the present. As such he was involved in all of the negotiations and
15 agreements that have passed between the parties in this action.

16 Defendants' motion to dismiss this action relies upon what they call a "novation
17 agreement" which settled all claims between Sunnyside Development Company and defendants
18 Opsys Limited, and CDT Limited. This "novation agreement" never became effective because
19 defendants never satisfied the three conditions stated in paragraph 6 of the novation agreement for
20 it to become effective. This "novation agreement" was the "Assignment of Lease and Consent of
21 Lessor" ("Assignment") attached as exhibit C to the Request for Judicial Notice of defendants.

22 By its own terms this Assignment never became effective. Paragraph 6 of said Assignment
23 placed four conditions upon the consent of Lessor, Sunnyside Development Company. Those
24 conditions were never met and as such plaintiff Sunnyside Development Company never
25 consented to the assignment.

26 The first condition that was never met was that a document entitled Amendment No. 2 to
27 Lease would be executed and incorporated into the Assignment. Amendment No. 2 to Lease was
28 never executed and was never signed by any representative of Opsys Limited or by Sunnyside.

1 Indeed the copy in the defendants' Request for Judicial Notice is not signed. Therefore,
2 defendants cannot claim that the document was executed by their own admission.

3 Furthermore, a signed copy of Amendment No. 2 to Lease was never received by plaintiff
4 Sunnyside Development Company or Sunnyside's attorney James Bow. Also, Sunnyside
5 Development Company never signed it because defendants never signed it. Although it was the
6 subject of extensive negotiation between the parties, it was never executed by either party.

7 The second condition was that a letter of credit that would have become a portion of the
8 security deposit be deposited by Assignee Opsys US with Lessor Sunnyside Development
9 Company. This letter of credit by the terms of Amendment No. 2 to Lease would have increased
10 the letter of credit portion of the Security Deposit to \$750,000 and the total security deposit to \$1
11 million. Such letter of credit was never received by Sunnyside Development Company.

12 The third condition was that a pollution liability insurance policy be procured by Lessee
13 (defendants) and delivered to Lessor (Sunnyside Development Company). Such a pollution
14 liability insurance policy by the terms of Amendment No. 2 to Lease would have maintained at all
15 times \$1 million of coverage with a deductible of no more than \$10,000 covering injury, property
16 damage and cleanup costs associated with any hazardous substance pollution. Such pollution
17 liability insurance policy was never obtained or delivered to plaintiff Sunnyside Development
18 Company.

19 Therefore, of the three conditions placed on Lessee (Opsys Limited) for Lessor Sunnyside
20 Development Company's consent, none of those conditions were met and Sunnyside never
21 consented to the Assignment by its own terms.

22 The Assignment (also called the novation agreement) was executed by the parties in
23 October, 2002, on a date that is illegible on the defendants' copy. That Assignment by its terms
24 would have become effective on the date when all of the above conditions in paragraph 6 of the
25 Assignment were satisfied. Also by its terms, if the above conditions were not satisfied within 90
26 days of the date it was executed the assignment would be "null and void and of no force and effect
27 whatsoever." Therefore, the assignment was null and void and never became effect because the
28 conditions were never met.

1 At least one mechanic's lien was filed against Opsys and the property because defendant
2 failed to pay its bills prior to the execution of the assignment and three mechanic's liens were filed
3 after it was executed on December 4, 2002, December 10, 2002 and December 16, 2002. Each of
4 these liens was a violation of the original lease and if plaintiff Sunnyside Development Company
5 had known of them would never have considered consenting to the Assignment. Sunnyside
6 Development Company did not know of these liens at the time it signed the Assignment.

7 Prior to and during the period when the Assignment was being negotiated and executed,
8 hazardous materials that contaminated the property were not being processed and disposed of
9 properly by defendant Opsys Limited. This was a violation of the original lease terms and if
10 plaintiff Sunnyside Development Company had known of this breach of the lease, as well as
11 federal, state, and local environmental laws, it would never have consented to the Assignment.

12 In addition, the rent for December 2002 was not paid by Opsys Limited to Sunnyside
13 Development Company and no rent has been paid since that time. Under the terms of the original
14 lease and the fact that plaintiff Sunnyside Development Company never consented to the
15 Assignment, defendant Opsys Limited is obligated to pay rent and has not done so. As such,
16 defendant Opsys Limited was in breach of the lease. Therefore, the Assignment is invalid for that
17 reason also.

18 On May 8, 2003, the City of Fremont posted a Notice of Violation & Order to Comply for
19 creating a condition dangerous to human health, property and the environment and failure to
20 submit a Hazardous Health Business Plan. (Exhibit A to the Declaration of Frank Chiu.)

21 Defendants Opsys Limited and CDT Limited have persistently ignored this Notice of
22 Violation and as a result plaintiff Sunnyside Development Company has incurred extensive
23 expenses and other damages associated with addressing the dangerous condition.

24 On May 5, 2003, the United States Bankruptcy Court issued a restraining order to prevent
25 the removal of equipment or the transferring of any intellectual property from the premises.
26 (Exhibit B to the Declaration of Frank Chiu.)

27 Defendants Opsys Limited and CDT Limited have ignored this Temporary Restraining
28 Order which has subjected plaintiff Sunnyside Development Company to further damages.

1 Defendant Opsys Limited continued to dismantle and remove the equipment on the
2 premises and in doing so destroyed a wall. This destruction led to further contamination in
3 violation of environmental regulations regarding Hazard Substances. It was later discovered that
4 personnel employed by Opsys Limited to remove said equipment were not trained in dealing with
5 hazardous material in further violation of the environmental regulations.

6 The actions of defendants were fraudulent because an agent for defendants, Gary Rhea,
7 provided false financial statements to Lessor Sunnyside Development Company on two separate
8 occasions. These false financial statements had the effect of misleading Sunnyside as to the
9 condition and intentions of defendants to avoid their responsibilities under the lease and further
10 damage Sunnyside by failing to perform their obligations under the lease. If plaintiff had known
11 the true financial condition of defendants, plaintiff would have had a warning to protect itself from
12 the damage that was caused by the failure to perform under the lease.

13 The actions of defendants were fraudulent because by seeking an Assignment under the
14 Lease they were misleading plaintiff as to the nature of their abandonment of the property. The
15 only purpose for the Assignment of the Lease was to mislead plaintiff as to the nature of the
16 defendants' departure from the property. Plaintiff Sunnyside Development Company relied on the
17 representations made in the Assignment of Lease and Consent of Lessor, and the Amendment
18 No. 2, to Lease to its detriment.

19 On November 1, 2002, counsel for plaintiff Sunnyside Development Company, James
20 Bow, wrote to Gary Rhea of Opsys US corporation, drawing his attention to the fact that the
21 pollution liability insurance policy was unsatisfactory and that the Amendment No. 2 to Lease had
22 not been signed. (Exhibit C to the Declaration of Frank Chiu.)

23 On December 16, 2002, and again on January 10, 2003, plaintiff's representative wrote to
24 Opsys Limited in care of the premises notifying defendant that it was in default of the lease for
25 nonpayment of rent. Both letters reminded defendant Opsys Limited that the Assignment of the
26 lease had not taken effect. (Exhibit D to the Declaration of Frank Chiu.)

27 On December 17, 2002, counsel for plaintiff Sunnyside Development Company, James
28 Bow, wrote to Opsys Limited at the premises informing it that plaintiff had been informed of the

1 Gilligan v. Jamco Development Corp. 108 F.3d 246, 249 (9th Cir., 1997). See also, Colaprico v.
2 Sun Microsystems, Inc. 758 F.Supp. 1335, 1339, (N.D., 1991).

3 Similarly, this jurisdiction has held that a dismissal under Rule 12(b)(6) is proper only in
4 extraordinary circumstances. United States v. Redwood City 640 F.2d 963, 966 (9th Cir., 1981).

5 For our purposes here the case of Bennett v. Schmidt 153 F.3d 516 is even more
6 instructive. The court in Bennett, at 518, said:

7 “Instead of lavishing attention on the complaint until the plaintiff
8 gets it just right, a district court should keep the case moving – if the
9 claim is unclear, by requiring a more definite statement under Rule
10 12(e), and if the claim is clear but implausible, by inviting a motion
11 for summary judgment.”

12 In addition, it has long been held that the complaint must be construed in the light most
13 favorable to plaintiff. Any doubt as to whether a claim is valid is resolved in favor of plaintiff.
14 (Parks School of Business, Inc. v. Symington 51 F.3d 1480, 1484 (9th Cir., 1995).) On the same
15 point the United States Supreme Court, in Conley v. Gibson 355 U.S. 41, 45-46, 78 S.Ct. 99, 102
16 (1957), has said:

17 “A complaint should not be dismissed for failure to state a claim
18 unless it appears beyond a doubt that the plaintiff can prove no set of
19 facts in support of his claim which would entitle him to relief.”

20 The question of plaintiff's ability to prove his allegations is not at issue in a motion for
21 dismissal under Rule 12(b)(6). For example, in citing a US Supreme Court case, the court in
22 Nami v. Fauver 82 F.3d 63, 65 (3rd Cir., 1996) said:

23 “We must determine whether, under any reasonable reading of the
24 pleadings, the plaintiffs may be entitled to relief, and we must accept
25 as true the factual allegations in the complaint and all reasonable
26 inferences that can be drawn therefrom. [citation omitted] The
27 complaint will be deemed to have alleged sufficient facts if it
adequately put the defendants on notice of the essential elements of
the plaintiffs' cause of action. Since this is a Section(s) 1983 action,
the plaintiffs are entitled to relief if their complaint sufficiently
alleges deprivation of any right secured by the Constitution. Id. In
considering a Rule 12(b)(6) motion, we do not inquire whether the
plaintiffs will ultimately prevail, only whether they are entitled to
offer evidence to support their claims. Scheuer v. Rhodes, 416 U.S.
232, 236 (1974).”

28 With respect to the issue that the court must accept as true all material allegations in the

1 complaint, as well as reasonable inferences to be drawn from them, even if they are unlikely, see
2 also, Pareto v. F.D.I.C. 139 F.3d 696, 699 (9th Cir., 1998).

3 The point here is that the standard that defendant must reach to dismiss the claims for
4 failure to state a cause of action are very high. Defendants have clearly failed to meet its burden as
5 we will demonstrate below.

6 B. Dismissal Must Be Based on Face of Complaint

7 Ordinarily a Rule 12(b)(6) motion cannot be used to raise an affirmative defense.
8 Complaints need not contain any information about defenses and may not be dismissed for that
9 omission. Xechem, Inc. V. Bristol-Myers Squibb Co. (7th Cir. 2004) 372 F.3d 899, 901.

10 In this case defendant have reached out to amendments that it claims were added to the
11 lease agreement. The plaintiff disputes those claims. The Assignment of Lease and Consent of
12 Lessor was never consented to by its own terms. The Assignment depended upon the completion
13 of a document called Amendment No. 2 to Lease that was never executed.

14 A defense to a complaint that would make the complaint subject to a motion to dismiss
15 must be absolute because any conditional defense calls into the question the truth of the allegations
16 and the allegations must be taken as true to the benefit of plaintiff for the purposes of a motion to
17 dismiss under a Rule 12(b)(6) motion. Where the defense disclosed in the complaint is
18 conditional rather than absolute, a Rule 12(b)(6) motion to dismiss should be denied.
19 (McCalden v. California Library Ass'n (9th Cir. 1990) 955 F.2d 1214, 1219.)

20 It is not up to plaintiff to prove its case. It is only necessary to show that if the allegations
21 were proven, it would have a case that was legally sufficient. That is clearly present here. The
22 facts and the allegations of fraudulent motive are clearly stated in the complaint.

23 Unless the court converts the Rule 12(b)(6) motion into a summary judgment motion or the
24 defense is apparent from matters of which the court may take judicial notice, the court cannot
25 consider material outside the complaint. Consideration of declarations or extraneous documents
26 should not be considered as bearing on a motion to dismiss under Rule 12(b)(6) because the
27 allegations of plaintiff are only being tested for their legal sufficiency and all contentions of
28 plaintiff are taken as true. (Arpin v. Santa Clara Valley Transp. Agency (9th Cir. 2001) 261 F.3d

1 912, 925.)

2 When a complaint's allegations are capable of more than one inference, the court must
3 adopt whichever inference supports a valid claim. Columbia Natural Resources, Inc. v. Tatum (6th
4 Cir. 1995) 58 F.3d 1101, 1109. In this case, defendants seek to establish an inference that an
5 assignment that was never consented to should be taken as having voided and superceded the
6 contract. This is a highly disputed inference and cannot form the basis for a motion to dismiss.

7 In this case, the motion to dismiss depends not only on purported defects not on the face of
8 the complaint, but depends upon on documents that are not highly disputed and should be the
9 subject of extensive discovery. The motion to dismiss is nothing but a blatant attempt invoke a
10 quasi-summary judgment before the defendants have even answered and the defenses are even
11 offered.

12 C. Fraud Cause of Action Is Sufficient

13 The fraud cause of action should survive and plaintiff requests leave of court to amend the
14 complaint.

15 Regarding defendants' motion to dismiss the fraud cause of action as being void for
16 vagueness, the breach of contract together with the allegations of an attempt perpetrate an invalid
17 assignment of the lease are sufficient to constitute an allegation of fraud. In addition, defendants'
18 agents and representative offered plaintiff false financial statements, misrepresented defendants'
19 financial solvency, not to mention concealing the motive and intentions with regard to the breach
20 of the lease. See Declaration of Frank Chiu, para. 15.

21 In addition to these issues, plaintiff ignored the temporary restraining order with respect to
22 the premises and ignored a Notice of Violation with respect to violation of environmental
23 regulations. See Declaration of Frank Chiu, para. 10, 11 and 12. In addition, defendants failed to
24 report to plaintiff mechanics liens against the property in violation of the lease. See Declaration of
25 Frank Chiu, para. 7.

26 In the alternative, plaintiff requests leave of court to amend the complaint in order to
27 describe in detail the identities of defendants' agents, employees, and officers who made false
28 statements to plaintiff which constitute fraud, detailed verbatim renditions of the actual

1 misrepresentations uttered by defendants' agents and specific dates and locations where the
2 fraudulent statements were made.

3 Federal Rule of Civil Procedure, Rule 15 requires the court to adopt a very liberal policy
4 toward giving a plaintiff leave to amend the complaint at least once.

5 D. Plaintiff Objects to Conversion to Summary Judgment and to Judicial Notice

6 There are severe limitations to the type of documents that may be attached to a motion to
7 dismiss under Rule 12(b)(6). Documents that are quoted in part by the complaint or are referred to
8 in the complaint but not included may be used in a Rule 12(b)(6) motion if no party questions the
9 authenticity of the document. See Branch v. Tunnell (9th Cir. 1994) 14 F.3d 449, 454, and In re
10 Stac Electronics Securities Litig. (9th Cir. 1996) 89 F.3d 1399, 1405.).

11 On the other hand, where the complaint alleges a contract the court may not consider
12 documents that are not indisputably the basis for the alleged contract. (BJC Health System v.
13 Columbia Cas. Co. (8th Cir. 2003) 348 F.3d 685, 687.) Of course, the assignment of the lease,
14 which is highly disputed and never became effective on its face because it was not consented to by
15 plaintiff, cannot now be brought in as the basis for a motion to dismiss. The assignment of the
16 lease goes to the nature of the fraud not the nature of the contract. Seeking a dismissal based on
17 such disputed documents is clearly preposterous and well outside the scope of what can
18 legitimately become a part of a motion to dismiss under Rule 12(b)(6).

19 The abortive and invalid attempt to transfer the lease of the premises from Opsys Limited
20 and assign the lease to Opsys US is of the essence of the fraud. Seeking a motion to dismiss on
21 that basis is tantamount to contending that the fraud should have worked and plaintiff should be
22 without recourse against defendants because of the failed and irresponsible attempt to assign the
23 lease.

24 At this stage in the proceedings any ambiguity in the documents must be resolved in
25 plaintiff's favor. International Audiotext Network, Inc. v. AT&T Co. (2nd Cir. 1995) 62 F.3d 69,
26 72. The documents relied upon by defendants in this case are highly disputed as to their validity
27 and import. That those documents should be considered by the court under the premise that they
28 are a part of the contract is both preposterous and unfounded.

1 It is true that judicial notice may be taken of official records and reports. MGIC Indem.
2 Corp. v. Weisman (9th Cir. 1986) 803 F.2d 500, 504. However, contested assignments and
3 amendments to a lease that were never executed or consented to, and never became effective are
4 not "official records" in that sense.

5 It is clear that defendants' motion to dismiss attempts to carve out some special ground
6 half way between a motion to dismiss and a summary judgment where defendants get the
7 advantages of a motion to dismiss without the burden of proof in a summary judgment and without
8 plaintiff having a chance to propound the discovery that would be necessary and to which the
9 plaintiff is entitled.

10 E. Standards for Summary Judgment Have Not Been Met

11 Plaintiff is entitled to heightened notice of a motion for summary judgment before an
12 answer.

13 Plaintiff is entitled to do discovery on its claims in order to respond to a motion for
14 summary judgment. When a motion to dismiss is converted to a motion for summary judgment by
15 reference to extrinsic evidence, summary judgment requirements apply and the opposing party
16 must be provided a reasonable opportunity to present material relevant to a Rule 56 motion.
17 (Cunningham v. Rothery (9th Cir. 1998) 143 F.3d 546, 549.)

18 Implicit in the opportunity to respond to summary judgment is the requirement that
19 sufficient time be afforded for discovery purposes to develop facts essential to justify a party's
20 opposition to the motion. (Portland Retail Druggists Ass'n v. Kaiser Foundation Health Plan (9th
21 Cir. 1981) 662 F.2d 641, 645.)

22 If plaintiff has clearly stated a valid claim and a motion to dismiss does not apply, as it
23 does not in this case, plaintiff must have a chance to pursue its discovery plan as outlined in the
24 Declaration of Stanley Hilton, attached hereto.

25 Plaintiff invokes Federal Rule of Civil Procedure, Rule 56(f) to request that the court
26 continue the summary judgment motion at least six months and permit summary judgment only
27 after defendants have filed an answer to the complaint, so that plaintiff can ascertain what
28 defendants' affirmative defenses are and so that plaintiff can have an adequate time to conduct

1 discovery as stated in the discovery plan of plaintiff's attorney, Stanley G. Hilton, in his
2 declaration.

3 It is not necessary that plaintiff be specific as to the goals of discovery beyond what has
4 been alleged above. In a case such as the present situation where no discovery has taken place at
5 all, the required showing for the expectations of discovery is very low. The party making a
6 summary judgment motion under Rule 56(f) requesting continuance of the proceedings for
7 additional discovery cannot be expected to frame its motion with great specificity as to the kind of
8 discovery likely to turn up useful information as the ground for such specificity has not been laid.
9 (Burlington Northern Santa Fe R.R. Co. v. Assinibione & Sioux Tribes of Fort Peck Reservation
10 (9th Cir. 2003) 323 F.3d 767, 774.) Therefore, the grounds for a continuance to allow plaintiff to
11 act on its discovery plan is very compelling.

12 F. Plaintiff Alleges CDT Limited Alter Ego of Opsys Limited

13 Plaintiff is informed and believes that CDT Limited and Opsys Limited are the alter egos
14 of each other. Opsys Limited may have acted as the agent of CDT Limited in shedding its
15 liabilities and debt as part of the plan to merge the assets of Opsys Limited into CDT Limited and
16 obtain the assets only. Thus, CDT broke the lease contract with plaintiff and ended up with the
17 assets of Opsys while avoiding the obligations of Opsys Limited contract with plaintiff to the
18 detriment of plaintiff.

19 Plaintiff needs to do discovery to lift the corporate veil and find out where the assets of the
20 entity that broke its contract with plaintiff ended up.

21 G. Bankruptcy of Opsys Us Was Sham Proceeding

22 Defendants quite correctly point out in their motion to dismiss that plaintiff took an active
23 role in the bankruptcy

24 That is the nature of the fraud perpetrated upon plaintiff that Opsys Limited and CDT
25 Limited split Opsys Limited and Opsys US into distinct entities and left all of the liabilities with a
26 bankrupt entity, while retaining all of the assets for itself.

27 That was a fraudulent attempt to deprive plaintiff of the benefits of the lease contract to
28 which Opsys Limited had been a party. That is exactly why plaintiff is now suing Opsys Limited

1 and CDT Limited. Are the defendants contending that having once been taken in by the swindle
2 plaintiff should be without recourse.

3 Or perhaps the defendants are attempting to perpetrate upon the Court the same fraud that
4 was perpetrated upon plaintiff. In any case, the point here is that plaintiff should be afforded the
5 opportunity to prove his case. If, as plaintiff contends, defendants deliberately left an entity with
6 no assets and removed the assets to their own coffers, that is a fraud. If plaintiff can prove it,
7 plaintiff will be entitled to damages. That is all that is at issue at this point, and defendants should
8 be required to answer and offer whatever defenses they may have.

9 IV. CONCLUSION

10 Therefore, the overwhelming conclusion is that the plaintiff has stated facts sufficient to
11 meet the threshold of pleading for claims of breach of contract and fraud. A motion to dismiss
12 under Rule 12(b)(6) cannot be based on documents outside the face of the complaint that are
13 highly disputed as to their validity, relevance and meaning. A motion for summary judgment
14 would be highly inappropriate as defendants have not answered and plaintiff must be granted time,
15 at the very least to conduct discovery as to the facts.

16 The motion for dismissal should be rejected by this court and the defendants should be
17 required to answer the complaint.

18 DATED: March 21 , 2005

LAW OFFICES OF STANLEY G. HILTON

19 By /s/
20 Stanley G. Hilton, Attorney for Plaintiff
21 Sunnyside Development Company
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EXHIBIT C

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7 UNITED STATES DISTRICT COURT
8 NORTHERN DISTRICT OF CALIFORNIA
9

10 SUNNYSIDE DEVELOPMENT
11 COMPANY, LLC,

No. C 05-0553 MHP

12 Plaintiff,

13 v.

14 OPSYS LIMITED and CDT LIMITED,

MEMORANDUM & ORDER
Motion to Dismiss

15 Defendants.
16 _____/

17
18 Plaintiff Sunnyside Development brought this breach of contract and fraud action against defendants
19 Opsys Limited and CDT Limited, both United Kingdom companies. Now before the court is defendants'
20 motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). Having read the parties' papers
21 and considered their arguments, the court hereby enters the following memorandum and order.

22 **BACKGROUND**¹

23 On February 15, 2001, plaintiff and defendant Opsys Limited signed a single tenant lease for rental
24 of commercial space at 47375 Fremont Boulevard in Fremont, California. The lease term ran from May 1,
25 2001 through April 30, 2008. As conditions of the lease, Opsys Limited agreed to pay plaintiff a monthly
26 base rent, to make certain capital improvements, and to conduct its business in an environmentally safe
27 manner, complying with all applicable environmental laws.
28

Opsys Limited continued to make rental payments to plaintiff until October 2002. At the time, defendant CDT Limited ("CDT") acquired control of Opsys' English business, Opsys UK Limited ("Opsys UK"). As part of the corporate reorganization accompanying CDT's acquisition of Opsys UK, plaintiff, Opsys Limited, and Opsys' United States subsidiary, Opsys US, signed a novation agreement that purportedly assigned Opsys Limited's rights and obligations under the lease to Opsys US. Under the terms of paragraph six of the novation agreement, the assignment was subject to a number of conditions precedent, including a provision requiring that both parties execute a second amendment to the lease. In addition, paragraph seven of the novation agreement provided that plaintiff would be paid \$50,000, to be deducted from Opsys Limited's original security deposit, in consideration for releasing Opsys Limited from liability under the lease.

Plaintiff received no rental payments after October 2002, and Opsys US was forced into involuntary bankruptcy by four of its creditors in May 2003. On December 14, 2004, plaintiff filed this action in the Superior Court for Alameda County alleging breach of contract and fraud. On February 7, 2005, Opsys Limited and CDT (collectively "defendants") removed the state court action to this court pursuant to 28 U.S.C. § 1441(a). On February 28, 2005, defendants moved to dismiss plaintiff's complaint under Federal Rule of Civil Procedure 12(b)(6), or, in the alternative, for summary judgment. That motion is now before the court.

LEGAL STANDARD

Dismissal under Rule 12(b)(6) is appropriate where a plaintiff "can prove no set of facts which would entitle him [or her] to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). Dismissal can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. Balistreri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1990). In reviewing a motion to dismiss, the court must accept the allegations in the complaint as true and draw all reasonable inferences in favor of the non-moving party. Usher v. City of Los Angeles, 828 F.2d 556, 561 (9th Cir. 1987). For purposes of adjudicating a motion to dismiss, a court may not consider material beyond the pleadings. Hal Roach Studios, Inc. v. Richard Feiner & Co., 896 F.2d 1542, 1555 n.19 (9th Cir. 1990). However,

documents not physically attached to a pleading but whose contents are alleged in the complaint may be considered. Branch v. Tunnell, 14 F.3d 449, 454 (9th Cir. 1994), overruled on other grounds by Galbraith v. County of Santa Clara, 307 F.3d 1119 (9th Cir. 2002).

DISCUSSION

I. Breach of Contract

The first cause of action in plaintiff's complaint alleges that defendants breached the original lease agreement by failing to make rent payments and by failing to comply with various other lease provisions. As an initial matter, the court notes that while both Opsys Limited and CDT are named as defendants to the breach of contract claim, the original lease agreement lists Opsys Limited as the sole lessee, and plaintiff's complaint contains no theory as to how CDT might be liable for breach of the original lease. Plaintiff now suggests that it will seek to hold CDT liable for breach of contract under an alter ego theory. However, because no such allegations appear on the face of the complaint, the court must dismiss plaintiff's breach of contract claim against CDT.

As noted above, Opsys Limited is a party to the original lease that defendants allegedly breached by failing to pay rent after October 2002. This would appear to state a claim for breach of contract. Nonetheless, Opsys Limited argues that under the terms of the novation, plaintiff consented to the assignment of Opsys Limited's interest in the lease to Opsys US and thus released Opsys Limited from any liability for breach of contract. The court assumes without deciding that it is appropriate to consider the contents of the novation agreement for the purpose of adjudicating the instant motion. However, even giving Opsys Limited the benefit of that assumption, there is nothing in the record to suggest that the conditions precedent to the agreement were satisfied. In particular, paragraph six of the novation required that both parties execute "Amendment No. 2" to the lease before the assignment could become effective. Defendants' Request for Judicial Notice ("RJN"), Ex. C at 2. Defendants suggested at the hearing that a signed copy exists, although they have been unable to locate it thus far. In its place, defendants have submitted an unsigned copy of Amendment No. 2, see RJN, Ex. C. However, absent submission of the alleged document, the court must assume that Amendment No. 2 was never executed by the parties.

1 Accordingly, because Opsys Limited failed to comply with the provisions of paragraph six, it appears that
2 the parties never agreed to the assignment and that any subsequent breach of the lease should be governed
3 by the terms of the original agreement.

4 Opsys Limited also asserts that pursuant to the terms of paragraph seven of the novation, plaintiff
5 received consideration for releasing defendant from liability under the original lease. Specifically, the
6 novation called for payment of \$50,000 to plaintiff on the effective date of the assignment, paid out of the
7 \$250,000 security deposit already in plaintiff's possession. In support of their motion to dismiss,
8 defendants have submitted the declaration of former Opsys Limited CEO Michael Holmes, who asserts
9 that Opsys paid plaintiff the agreed upon amount. This at least gives rise to the possibility that plaintiff
10 waived any objection to the failure of one or more conditions precedent to the assignment of the lease.
11 However, because the Holmes declaration may not be considered in adjudicating a motion to dismiss, the
12 court need not decide whether such a waiver occurred for the purpose of determining whether plaintiff
13 states a claim for breach of contract. Furthermore, even if it is assumed that plaintiffs received the \$50,000,
14 it is unclear if Opsys Limited's compliance with paragraph seven relieves it of its obligations under
15 paragraph six. Paragraph six specifically provides: "[i]n the event all of the foregoing conditions are not
16 fully satisfied by ninety (90) days after the date first written above, Lessor's foregoing consent shall
17 automatically be null and void and of no force or effect whatsoever." RJN, Ex. C at 2. This language
18 suggests that, notwithstanding payment of the \$50,000, failure to meet the conditions of paragraph six voids
19 the novation in its entirety. At the very least, the operation of paragraph six vis-à-vis paragraph seven is a
20 matter of factual dispute. Thus, drawing all inferences in favor of plaintiff, the court cannot conclude as a
21 matter of law that Opsys Limited was relieved of further liability under the original lease by the October
22 2002 novation agreement.

23 In the alternative, defendants argue that plaintiff is judicially estopped from denying the validity of
24 the novation agreement because it has asserted claims against Opsys US's bankruptcy estate. The doctrine
25 of judicial estoppel is designed to "protect the integrity of the judicial process" and to prevent parties from
26 "playing fast and loose with the facts." New Hampshire v. Maine, 532 U.S. 742, 749-50 (2001) (citations
27 omitted). Several factors inform the application of judicial estoppel, including whether a party's later
28

1 position is "clearly inconsistent" with its earlier position, whether the party has succeeded in persuading a
2 court to accept that party's earlier position, and whether the party seeking to assert an inconsistent position
3 would derive an unfair advantage if not estopped. Id. at 750-51.

4 Here, plaintiff filed a proof of claim with the United States Bankruptcy Court seeking
5 \$1,906,657.10 from Opsys US for unpaid rent, loss of use of property, mechanic's liens, and restoration of
6 premises. However, Opsys US's bankruptcy trustee rejected that claim as a matter of law. RJN, Ex. K at
7 1. Given its inability to recover from Opsys US's bankruptcy estate, it is neither surprising nor unfair that
8 plaintiff has sought to hold Opsys Limited liable on the original lease agreement. Thus, plaintiff's failed
9 attempt to recover from Opsys US in its bankruptcy proceeding is insufficient to estop plaintiff from
10 pursuing its breach of contract claim against Opsys Limited in this court.

11 In summary, drawing all reasonable inferences in its favor, plaintiff states a claim that Opsys Limited
12 is liable for breaching the original lease agreement. Accordingly, defendants' motion to dismiss the breach
13 of contract claim must be denied with respect to Opsys Limited.

14 II. Fraud

15 The second cause of action in plaintiff's complaint alleges that plaintiff was fraudulently induced to
16 lease the Fremont Boulevard property to Opsys in February 2001. Defendants contend that this claim is
17 not pled with particularity as required by Federal Rule of Civil Procedure 9(b) and, accordingly, should be
18 dismissed. A common law fraud claim requires a showing of five elements: misrepresentation, knowledge
19 of falsity (scienter), intent to induce reliance, justifiable reliance, and resulting damage. Bank of the West v.
20 Valley Nat'l Bank of Ariz., 41 F.3d 471, 477 (9th Cir. 1994) (citation omitted). Plaintiff's complaint
21 alleges that Opsys made materially false representations to plaintiff by promising to comply with the terms of
22 the lease. Plaintiff alleges that these representations were intended to and did induce actual reliance by
23 plaintiff, thereby causing it substantial financial harm. However, defendants correctly point out that plaintiff
24 makes no allegation of scienter in its complaint. Plaintiff also makes no mention of how CTD could have
25 made fraudulent misrepresentations during the initial lease negotiation, given that CTD had no business
26 relationship with Opsys in 2001. Thus, because plaintiff's complaint fails to plead all five of the elements of
27
28

1 fraud with Rule 9(b)'s requisite particularity, the fraud claim must be dismissed with respect to both
2 defendants.²

3
4 CONCLUSION

5 For the foregoing reasons, defendants' motion to dismiss is GRANTED in part and DENIED in
6 part. Plaintiff is granted leave to amend its complaint for the purpose of alleging facts sufficient to establish
7 a fraud claim as to both defendants and establishing CDT's liability for breach of contract. Plaintiff shall file
8 its amended complaint no later than twenty (20) days from the date of this order.

9 IT IS SO ORDERED.

10
11 Dated: April 21, 2005

12 /s/ _____

13 MARILYN HALL PATEL
14 District Judge
15 United States District Court
16 Northern District of California
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ENDNOTES

1. All facts are taken from plaintiff's complaint, which is attached as Exhibit A to defendants' Notice of Removal, and from the documents incorporated by reference therein.
2. Plaintiff argues for the first time in its opposition brief that both defendants acted fraudulently in seeking to assign the lease to Opsys US because they knew that Opsys US was insolvent at the time of the assignment. For purposes of the instant motion, the court need not address the merits of this allegation because it is absent from the complaint. However, plaintiff may include such allegations in an amended complaint if its able to do so in good faith.

Exhibits D-H to Request for Judicial Notice

EXHIBIT D

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2 LAW OFFICES OF STANLEY G. HILTON
3 2570 NORTH FIRST ST., SUITE 200
4 SAN JOSE, CA 95131
5 Tel: (415) 378 6142
6 Fax: (415) 474 2005
7 Attorney for Plaintiff
8 SUNNYSIDE DEVELOPMENT CO., LLC

6 UNITED STATES DISTRICT COURT
7
8 NORTHERN DISTRICT OF CALIFORNIA

9 No. C 05-00553 MHP

10 SUNNYSIDE DEVELOPMENT
11 COMPANY, LLC

12) **FIRST AMENDED COMPLAINT FOR**
13 **MONETARY DAMAGES**

14 v.
15 Opsys Limited, a United Kingdom Company,
16 CDT LIMITED, A UK COMPANY,
17 Defendants.

12) **JURY TRIAL DEMANDED**

16 **FIRST CAUSE OF ACTION: BREACH OF CONTRACT (LEASE AGREEMENT)**

18 1 Plaintiff is a Limited Liability Company headquartered in Saratoga, CA and doing
19 business in California.

20 2. Defendant Opsys Limited, a United Kingdom company, is a British company
21 headquartered in England, which does business in California and has had offices in this district in
22 Fremont, CA. It is owned by defendant CDT, also a British company. Defendant signed a lease
23 agreement yielding to the personal jurisdiction of this court and thus agreed to be sued here.

24 3. **JURY TRIAL DEMANDED:** Plaintiff DEMANDS A JURY TRIAL IN THIS
25 CASE.

26 6. **VENUE:** Venue is proper here because all actions occurred in Fremont, CA in this
27 court's jurisdiction.
28

1 7. **JURISDICTION:** This court has diversity jurisdiction over this whole case as
2 defendants are domiciled in a different country than plaintiff, and plaintiff's damages demand
3 exceeds the jurisdictional minimum and is in fact over \$ 10 million,
4 has supplemental jurisdiction of all the state torts herein, because they all arose out of the same
5 operative nucleus of facts as the federal claim. All defendants have "minimum contacts" in
6 California and in this county, as they do business here and have had offices and facilities in this
7 district, in Fremont, CA, during all times mentioned.

8 8. On or about February 15, 2001 plaintiff and defendant signed a single tenant lease
9 contract for seven years and three months (from May 1, 2001 through April 30, 2008, for rental of
10 space at 47375 Fremont Blvd., in Fremont, CA. Under the terms of this contract, defendant also
11 agreed to make certain capital improvements on the property, as consideration for the leased.
12 Defendant agreed to pay plaintiff a monthly base rent. The contract provides that defendant agreed
13 to be sued in this court and also provides that attorney fees and costs must be awarded to the
14 prevailing party in a lawsuit brought by plaintiff to enforce the lease, or for breach of contract
15 and fraud. As part of the terms and conditions of the lease, defendant agreed to pay all its bills to
16 all creditors and agreed not to allow a mechanics lien or other type of lien to be placed on the
17 property for its failure to pay money due creditors, and defendant also agreed that it would
18 conduct business in an environmentally safe manner complying with environmental laws of the
19 US and California and Alameda County. Defendant promised to maintain its premises in a clean
20 and environmentally-safe manner. The agreement provided that if defendant defaulted or broke
21 the lease, and plaintiff sued and prevailed, plaintiff would be entitled to an award of attorney fees
22 and costs.

23 9. On or about May 1, 2001, the parties began performance on the lease. Defendant
24 moved into the premises and set up operations there, brought equipment and supplies and
25 personnel there, and proceeded to perform work in the high technology area.

26 10. Plaintiff performed all conditions under the lease contract and remained ready to
27 perform.
28

1 11. On or about November 2002, defendant materially breached the lease by refusing to
2 pay rent. The last rent payment was received on or about October 2002. Defendant further
3 breached the lease agreement in or about October 2002 by failing to pay its debts to certain
4 contractors, who placed five mechanics liens on the property for work they had done on the
5 property but been unpaid for by defendants. Defendant further materially breached the lease
6 contract by conducting operations in an environmentally unsafe manner, in violation of the laws,
7 including hazardous and improper dumping and disposal of chemicals and other hazardous
8 substances. Plaintiff avers that throughout the years 2001 and 2002, defendant CDT LIMITED, A
9 UK COMPANY ("CDT"), acted as the alter ego of defendant Opsys Limited, a United Kingdom
10 Company ("Opsys Ltd"), vis-a-vis the lease contract that is the subject of this case, in that CDT in
11 early 2001 entered into *sub rosa* negotiations to purchase Opsys Ltd as a corporate acquisition,
12 and CDT was well aware of what Opsys Ltd intended to do vis-a-vis this lease with plaintiffs (i.e.,
13 walk away from the lease by fraudulent schemes and material breaches of contract), and CDT
14 materially participated in, aided and abetted Opsys Ltd in its decision to materially breach the
15 lease contract with plaintiff. Indeed, plaintiff now possesses documents and has witnesses which
16 provide incontrovertible evidence that when CDT was involved in negotiations to purchase
17 Opsys Ltd, in 2001 and 2002, one of the *SINE QUA NON* CONDITIONS which CDT created for
18 its purchase of Opsys Ltd was that Opsys Ltd somehow get rid of its debt burdens owed to
19 plaintiff under this lease and that it somehow "terminate" said lease obligations. Thus CDT not
20 only encouraged, but also DEMANDED, that Opsys Ltd materially breach its lease contract with
21 plaintiff, as a *sine qua non* for its acquiring Opsys Ltd. Thus CDT acted as not only an alter ego
22 of Opsys Ltd, but also as an actual co-conspirator who committed the tort of tortious interference
23 with contractual relations (viz., contractual relations between Opsys Ltd and plaintiff), and made
24 this material breach of contract by Opsys Ltd a *sine qua non* of its lucrative offer to purchase
25 Opsys Ltd. The did occur, after Opsys Ltd breached its llease contract with plaintiff.

26 12. As a proximate result of the above acts of Defendants, plaintiff has suffered loss
27 of approximately over \$ 5 million in rental income, and has incurred further costs to pay off the
28

1 three liens on the property, and has incurred further costs and fines and penalties to remediate and
2 clean up the toxic contamination caused by defendant, and has incurred attorney fees and
3 litigation costs to bring this suit. The amount of damages in total exceeds \$ 10 million. The
4 environmental contamination made it impossible for plaintiff to use or rent the property until
5 approximately September 2004, and plaintiff has not been able to find a tenant yet. Plaintiff has
6 also been damaged in losing the net increased value of the property which should have accrued if
7 defendant had performed as promised and had made the capital improvements it had promised.

8 13. As a further proximate result of defendant's material breach of lease contract, plaintiff
9 has incurred attorney fees and costs to bring this action as well as other attorney fees and costs, to
10 try to persuade defendant to meet its obligations, in an amount according to proof.

11
12 WHEREFORE, plaintiff prays for judgment against defendants, and each of them, as
13 hereinafter set forth.

14 **SECOND CAUSE OF ACTION**

15 **(FRAUD)**

16 14. Plaintiff realleges and incorporates by reference, paragraphs 1 through 13 above, and
17 incorporates them herein by reference as if fully set forth herein.

18 15. On or about February 15, 2001, in Fremont, CA and also in Oxford, England,
19 defendants CDT and Opsys Ltd , by their officers and agents Gary Rhea (CFO Of Opsys) and
20 Michael Holmes (CEO of Opsys) and other officials of defendants, made materially false
21 representations to plaintiff in order to induce plaintiff to lease the property to them. Defendants
22 OPSYS Ltd and CDT had SCIENTER, i.e. knowledge, of the falsify of their representations
23 which they made to plaintiff. CDT is liable for OPSYS Ltd's fraud also because such scienter
24 must be imputed to CDT under the "alter ego theory" as explained *supra*. *Ceteris parabus*, it must
25 be noted that CDT assumes all of the liabilities and assets of Opsys Ltd, including liability for
26 fraud as explained in this cause of action. These misrepresentations included, *inter alia*, a promise
27 that defendant would pay its rent every month for the entire period of the lease, from May 1 2001
28

1 through April 30 2008. They also told plaintiff that defendant would make additions and capital
2 improvements to the property, during the lease period, to improve the value of the property, and
3 they promised not to violate any environment al laws and they promised not to incur any
4 mechanics liens on the property. *Defendants had scienter of the falsity of their representations*
5 *made to plaintiffs*, as is evinced, *inter alia*, by much evidence that defendants knew that at the
6 time they entered into the lease contract in or about February 2001, they had no intention of
7 making the improvements on the Fremont property promised, had no intention of cleaning up
8 hazardous chemicals and disposing of them properly, and had no intention of paying rent under its
9 lease obligations, and intended all along to pawn off their debts under the lease on a straw man
10 subsidiary, "Opsys USA", which defendants intended to set up as a straw man *with no viability*
11 *whatsoever*. This fraudulent scheme was concocted both by CDT and Opsys Ltd solely for the
12 purpose of defrauding plaintiffs into signing the lease and allowing defendants to move into the
13 Fremont buildings, doing work there without paying rent, dumping hazardous and toxic chemicals
14 there, and then walking away from their lease obligations. In numerous meetings between
15 plaintiffs' official manager Frank Chiu and others, and defendants' officials, including Gary Rhea
16 (CFO of defendants), in Fremont, CA, during the 6 months before the lease was entered into by
17 the parties, these fraudulent misrepresentations were made to plaintiffs by defendants and via their
18 official spokesman and agent, Rhea. Also, other officials of defendants made such fraudulent
19 misrepresentations to plaintiffs. In fact, defendants had a *sub rosa* scheme from the outset,
20 whereby they planned to use the Fremont building owned by plaintiff, dump many toxic chemicals
21 there without any intent to clean them up, pawn off their lease rent obligations on a straw man
22 subsidiary, and walk away from the lease without paying rent (as part of this fraudulent scheme,
23 defendants intended to create a non-viable straw man "dummy shell" corporation ("Opsys USA"),
24 which they intended to sue as a mere ploy and conduit by which they intended to escape liability
25 under the lease (in addition to other ploys and gambits for escaping liability). The defendants thus
26 had scienter of the falsity of their representations to plaintiff, and the falsity of their
27 representations was unknown to plaintiff, who believed them to be true at the time plaintiff was
28

1 induced to enter into the lease.

2 16. Plaintiff believed the representations of defendants described in the preceding
3 paragraph, and relied on them to its detriment, in that it entered into the lease agreement that is the
4 subject of this action. It suffered detriment.

5 17. As a proximate result of the above acts of Defendant, plaintiff has suffered loss of
6 approximately over \$ 5 million in rental income, and has incurred further costs to pay off the five
7 mechanics liens on the property, and has incurred further costs and fines and penalties to
8 remediate and clean up the toxic contamination caused by defendant's dumping hazardous
9 chemicals on site. The amount of damages in total exceeds \$ 10 million. The environmental
10 contamination made it impossible for plaintiff to use or rent the property until approximately
11 September 2004, and plaintiff has not been able to find a tenant yet. Plaintiff has also been
12 damaged in losing the net increased value of the property which should have accrued if defendant
13 had performed as promised and had made the capital improvements it had promised.

14 18. As a further proximate result of defendant's material breach of lease contract, plaintiff
15 has incurred attorney fees and costs to bring this action as well as other attorney fees and costs, to
16 try to persuade defendant to meet its obligations, in an amount according to proof.

17 19. The actions of defendant were malicious, outrageous, wanton and oppressive in
18 defrauding plaintiff, and plaintiff is entitled to an award of punitive damages of \$ 25 million,
19 against defendant.

20
21 WHEREFORE, plaintiff prays for judgment against defendants, and each of them, as
22 hereinafter set forth.

23 **PRAYER FOR RELIEF**

24 WHEREFORE, plaintiff prays for judgment against the defendant as follows:

- 25 1. For unpaid rent in an amount according to proof;
26 2. For loss of value of the increased value of the property in an amount according to
27 proof ;
28

9. For such other and further relief as this Court deems fair, just and equitable.

Attorney for Plaintiff

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EXHIBIT E

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5 SUNNYSIDE DEVELOPMENT COMPANY, LLC

6
7 UNITED STATES DISTRICT COURT
8 NORTHERN DISTRICT OF CALIFORNIA
9

10 SUNNYSIDE DEVELOPMENT
11 COMPANY, LLC,

12 Plaintiff,

13 v.

14 OPSYS LIMITED, a United Kingdom
Company, CDT LIMITED, a UK Company,

15 Defendants.
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Case No.: C-05-00553 MHP

MEMORANDUM OF POINTS AND
AUTHORITIES IN OPPOSITION TO
MOTION TO DISMISS

Date: July 18, 2005

Time: 2:00 p.m.

Courtroom: 15, 18th Floor

Honorable Marilyn Hall Patel
United States District Judge

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I. INTRODUCTION

In its second motion to dismiss the defendants make the rather bizarre contradictory claim in its first sentence of their points and authorities that "very little has changed from plaintiff's . . . initial complaint."

What the defendants fail to point out is that in the order of this court regarding the first motion to dismiss, the court denied the motion with respect to Opsys Limited, and granted the motion with respect to Cambridge Display Technology Limited ("CDT, Limited") in order

The court specifically stated that:

"Plaintiff now suggests that it will seek to hold CDT liable for breach of contract under an alter ego theory. However, because no such allegations appear on the face of the complaint, the court must dismiss plaintiff's breach of contract claim against CDT."

Is the defendant now suggesting that they don't know what we are talking about? It is simply the defendants seeking to run plaintiff around the block again with nothing new to complaint about and ignoring the fact that the First Amended Complaint has repaired the defects that the court identified in partially granting the prior motion to dismiss. The case must now go forward.

The prior order of this court was that an alter ego theory needed to be added to bring CDT Limited within the scope of the breach of contract cause of action and that scienter needed to be added to the fraud cause of action especially with respect to CDT.

The order also states in a footnote:

"Plaintiff argues for the first time in its opposition brief that both defendants acted fraudulently in seeking to assign the lease to Opsys US because they knew that Opsys US was insolvent at the time of the assignment. For purposes of the instant motion, the court need not address the merits of this allegation because it is absent from the complaint. However, plaintiff may include such allegations in an amended complaint if its able to do so in good faith."

That is exactly what plaintiff has done. The plaintiff has repaired all of the defects that the court identified in its order. The efforts of the defendant to claim that the complaint has not changed does not bear up under scrutiny.

In fact nothing in the motion to dismiss bears up under scrutiny, most especially the

1 statement that the complaint must be dismissed again. The prior order granted in part and denied
2 in part the prior motion. The motion with respect to breach of contract against Opsys was denied
3 and therefore the breach of contract cause of action survives as to Opsys in any event.

4 But what must be acknowledged is that the breach of contract cause of action against
5 Opsys is the lynchpin on which all of the other causes of action hang. There is a breach of contract
6 cause of action against CDT Limited because each was the alter ego of the other. Of course, the
7 fraud cause of action was basically a conspiracy by both parties to defraud plaintiff because they
8 both had the crucial "scienter" the fore-knowledge that the scheme would breach the contract and
9 deprive (or defraud) plaintiff out of the monies owed.

10 As has been described before, defendants claim that plaintiff consented to the assignment
11 of the lease contract in question to another company. The court has already found that the
12 assignment of the lease agreement was never completed and by its own terms plaintiff never
13 consented to it.

14 In fact, it is the attempt to manipulate such an assignment to plaintiff's detriment that is of
15 the essence of the fraud that was perpetrated by defendants against plaintiff. Plaintiff was led to
16 believe that the Assignment of Lease and Consent of Lessor ("Assignment") that had been
17 negotiated would be completed and become effective. Such Assignment never became effective.

18 The defendants have breached the original lease agreement and defrauded plaintiff by
19 contending that the conditions to assign the lease to a successor in interest would be met. Such
20 conditions were never met and it is clear that the tender of such Assignment was merely a device
21 and subterfuge to avoid the defendants' liabilities under the contract. That was the fraud. And
22 since both parties knew of the dishonesty and misrepresentation and its likely effect to cheat
23 plaintiff, that is the scienter. The fraud cause of action rests precisely on that point.

24 Plaintiff Sunnyside Development Company needs to do discovery to determine the extent
25 to which the defendants are jointly and severably liable. It is only the ultimate facts that need to be
26 plead at this stage, and plaintiff has done it.

27 Modern federal rules of pleading allow a complaint to stand if it can prevail on any theory
28 assuming the facts pled are true. The plaintiff in this action has plainly met that burden and the

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1 motion for dismissal must be rejected. Equally the contention of a motion for summary judgment
2 is inapplicable and defendants should be required to answer the complaint.

3 If this Court finds any defects in the complaint, plaintiff requests leave to amend the
4 complaint to cure those defects.

5 If this Court converts this motion into a motion for summary judgment under Federal Rules
6 of Civil Procedure, Rule 56, plaintiff invokes Rule 56(f) and hereby requests at least six months to
7 conduct the necessary discovery to oppose a summary judgment motion consistent with the
8 discovery plan in the declaration of Stanley Hilton attached hereto.

9 II. STATEMENT OF FACTS

10 This is a suit that involves the redress of a very direct breach of contract and fraud.

11 In 2001, the defendant Opsys Limited executed a lease agreement with plaintiff for the
12 premises known as 47375 Fremont Boulevard in Fremont California.

13 As the property manager for Sunnyside Development Company, Frank Chui was the
14 representative of the plaintiff during all of the events described in this lawsuit from on or about
15 March 2002, through the present. As such he was involved in all of the negotiations and
16 agreements that have passed between the parties in this action.

17 Defendants' motion to dismiss this action relies upon what they call a "novation
18 agreement" which settled all claims between Sunnyside Development Company and defendants
19 Opsys Limited, and CDT Limited. This "novation agreement" never became effective because
20 defendants never satisfied the three conditions stated in paragraph 6 of the novation agreement for
21 it to become effective. This "novation agreement" was the "Assignment of Lease and Consent of
22 Lessor" ("Assignment") attached as exhibit C to the Request for Judicial Notice of defendants.

23 By its own terms this Assignment never became effective. Paragraph 6 of said Assignment
24 placed four conditions upon the consent of Lessor, Sunnyside Development Company. Those
25 conditions were never met and as such plaintiff Sunnyside Development Company never
26 consented to the assignment.

27 The first condition that was never met was that a document entitled Amendment No. 2 to
28 Lease would be executed and incorporated into the Assignment. Amendment No. 2 to Lease was

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1 never executed and was never signed by any representative of Opsys Limited or by Sunnyside.
2 Indeed the copy in the defendants' Request for Judicial Notice is not signed. Therefore,
3 defendants cannot claim that the document was executed by their own admission.

4 Furthermore, a signed copy of Amendment No. 2 to Lease was never received by plaintiff
5 Sunnyside Development Company or Sunnyside's attorney James Bow. Also, Sunnyside
6 Development Company never signed it because defendants never signed it. Although it was the
7 subject of extensive negotiation between the parties, it was never executed by either party.

8 The second condition was that a letter of credit that would have become a portion of the
9 security deposit be deposited by Assignee Opsys US with Lessor Sunnyside Development
10 Company. This letter of credit by the terms of Amendment No. 2 to Lease would have increased
11 the letter of credit portion of the Security Deposit to \$750,000 and the total security deposit to \$1
12 million. Such letter of credit was never received by Sunnyside Development Company.

13 The third condition was that a pollution liability insurance policy be procured by Lessee
14 (defendants) and delivered to Lessor (Sunnyside Development Company). Such a pollution
15 liability insurance policy by the terms of Amendment No. 2 to Lease would have maintained at all
16 times \$1 million of coverage with a deductible of no more than \$10,000 covering injury, property
17 damage and cleanup costs associated with any hazardous substance pollution. Such pollution
18 liability insurance policy was never obtained or delivered to plaintiff Sunnyside Development
19 Company.

20 Therefore, of the three conditions placed on Lessee (Opsys Limited) for Lessor Sunnyside
21 Development Company's consent, none of those conditions were met and Sunnyside never
22 consented to the Assignment by its own terms.

23 The Assignment (also called the novation agreement) was executed by the parties in
24 October, 2002, on a date that is illegible on the defendants' copy. That Assignment by its terms
25 would have become effective on the date when all of the above conditions in paragraph 6 of the
26 Assignment were satisfied. Also by its terms, if the above conditions were not satisfied within 90
27 days of the date it was executed the assignment would be "null and void and of no force and effect
28 whatsoever." Therefore, the assignment was null and void and never became effect because the

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1 conditions were never met.

2 At least one mechanic's lien was filed against Opsys and the property because defendant
3 failed to pay its bills prior to the execution of the assignment and three mechanic's liens were filed
4 after it was executed on December 4, 2002, December 10, 2002 and December 16, 2002. Each of
5 these liens was a violation of the original lease and if plaintiff Sunnyside Development Company
6 had known of them would never have considered consenting to the Assignment. Sunnyside
7 Development Company did not know of these liens at the time it signed the Assignment.

8 Prior to and during the period when the Assignment was being negotiated and executed,
9 hazardous materials that contaminated the property were not being processed and disposed of
10 properly by defendant Opsys Limited. This was a violation of the original lease terms and if
11 plaintiff Sunnyside Development Company had known of this breach of the lease, as well as
12 federal, state, and local environmental laws, it would never have consented to the Assignment.

13 In addition, the rent for December 2002 was not paid by Opsys Limited to Sunnyside
14 Development Company and no rent has been paid since that time. Under the terms of the original
15 lease and the fact that plaintiff Sunnyside Development Company never consented to the
16 Assignment, defendant Opsys Limited is obligated to pay rent and has not done so. As such,
17 defendant Opsys Limited was in breach of the lease. Therefore, the Assignment is invalid for that
18 reason also.

19 On May 8, 2003, the City of Fremont posted a Notice of Violation & Order to Comply for
20 creating a condition dangerous to human health, property and the environment and failure to
21 submit a Hazardous Health Business Plan. (Exhibit A to the Declaration of Frank Chiu.)

22 Defendants Opsys Limited and CDT Limited have persistently ignored this Notice of
23 Violation and as a result plaintiff Sunnyside Development Company has incurred extensive
24 expenses and other damages associated with addressing the dangerous condition.

25 On May 5, 2003, the United States Bankruptcy Court issued a restraining order to prevent
26 the removal of equipment or the transferring of any intellectual property from the premises.
27 (Exhibit B to the Declaration of Frank Chiu.)

28 Defendants Opsys Limited and CDT Limited have ignored this Temporary Restraining

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1 Order which has subjected plaintiff Sunnyside Development Company to further damages.

2 Defendant Opsys Limited continued to dismantle and remove the equipment on the
3 premises and in doing so destroyed a wall. This destruction led to further contamination in
4 violation of environmental regulations regarding Hazard Substances. It was later discovered that
5 personnel employed by Opsys Limited to remove said equipment were not trained in dealing with
6 hazardous material in further violation of the environmental regulations.

7 The actions of defendants were fraudulent because an agent for defendants, Gary Rhea,
8 provided false financial statements to Lessor Sunnyside Development Company on two separate
9 occasions. These false financial statements had the effect of misleading Sunnyside as to the
10 condition and intentions of defendants to avoid their responsibilities under the lease and further
11 damage Sunnyside by failing to perform their obligations under the lease. If plaintiff had known
12 the true financial condition of defendants, plaintiff would have had a warning to protect itself from
13 the damage that was caused by the failure to perform under the lease.

14 The actions of defendants were fraudulent because by seeking an Assignment under the
15 Lease they were misleading plaintiff as to the nature of their abandonment of the property. The
16 only purpose for the Assignment of the Lease was to mislead plaintiff as to the nature of the
17 defendants' departure from the property. Plaintiff Sunnyside Development Company relied on the
18 representations made in the Assignment of Lease and Consent of Lessor, and the Amendment
19 No. 2, to Lease to its detriment.

20 On November 1, 2002, counsel for plaintiff Sunnyside Development Company, James
21 Bow, wrote to Gary Rhea of Opsys US corporation, drawing his attention to the fact that the
22 pollution liability insurance policy was unsatisfactory and that the Amendment No. 2 to Lease had
23 not been signed. (Exhibit C to the Declaration of Frank Chiu.)

24 On December 16, 2002, and again on January 10, 2003, plaintiff's representative wrote to
25 Opsys Limited in care of the premises notifying defendant that it was in default of the lease for
26 nonpayment of rent. Both letters reminded defendant Opsys Limited that the Assignment of the
27 lease had not taken effect. (Exhibit D to the Declaration of Frank Chiu.)

28 On December 17, 2002, counsel for plaintiff Sunnyside Development Company, James

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1 Bow, wrote to Opsys Limited at the premises informing it that plaintiff had been informed of the
2 existence of a lawsuit to enforce a mechanic's lien and that such mechanic's lien constituted a
3 violation of the lease and that defendant Opsys Limited would be deemed in breach of the lease.
4 (Exhibit E to the Declaration of Frank Chiu.)

5 On May 30, 2003, counsel for plaintiff Sunnyside Development Company, James Bow,
6 wrote to Frank Chiu attaching his communication with representatives of Opsys Limited
7 discussing revisions to the Amendment No. 2 to Lease and the requirements for the pollution
8 policy. This letter and its attachments document the fact that the pollution insurance policy or the
9 execution of the Amendment No. 2 to Lease was never received by him. (Exhibit F to the
10 Declaration of Frank Chiu.)

11 At the time defendant Opsys Limited persuaded plaintiff Sunnyside Development
12 Company to sign the Assignment, defendant Opsys defrauded plaintiff because it used Opsys US
13 as a strawman for the purpose of getting out of the lease and never paying plaintiff the rent that
14 was due and payable. Opsys US was intended by Opsys Limited to go bankrupt and to default on
15 all of its obligations to plaintiff and other creditors and was never a viable entity by design.
16 Defendant Opsys concealed this fact from plaintiff during the assignment negotiations and falsely
17 told plaintiff that Opsys US was a viable company and would pay its bills and have a great
18 financial future.

19 When it became clear that Opsys Limited and CDT Limited has had defrauded plaintiff,
20 plaintiff brought the present lawsuit.

21 III. ARGUMENT

22 A. Standard of Review

23 All of the principles of modern pleading support the idea that plaintiff must be allowed to
24 plead its case with the widest latitude, with the benefit of all doubts and all contentions or
25 ambiguities resolved in its favor

26 Courts view Federal Rules of Civil Procedure, Rule 12(b)(6) motions with disfavor
27 because of the role pleadings play in federal practice, the liberal policy toward amendment of the
28 pleadings and the right of a plaintiff to present his case on any theory that has a chance of success.

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1 "The motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted."
2 Gilligan v. Jamco Development Corp. 108 F.3d 246, 249 (9th Cir., 1997). See also, Colaprico v.
3 Sun Microsystems, Inc. 758 F.Supp. 1335, 1339, (N.D., 1991).

4 Similarly, this jurisdiction has held that a dismissal under Rule 12(b)(6) is proper only in
5 extraordinary circumstances. United States v. Redwood City 640 F.2d 963, 966 (9th Cir., 1981).

6 For our purposes here the case of Bennett v. Schmidt 153 F.3d 516 is even more
7 instructive. The court in Bennett, at 518, said:

8 "Instead of lavishing attention on the complaint until the plaintiff
9 gets it just right, a district court should keep the case moving – if the
10 claim is unclear, by requiring a more definite statement under Rule
12(e), and if the claim is clear but implausible, by inviting a motion
for summary judgment."

11 In addition, it has long been held that the complaint must be construed in the light most
12 favorable to plaintiff. Any doubt as to whether a claim is valid is resolved in favor of plaintiff.
13 (Parks School of Business, Inc. v. Symington 51 F.3d 1480, 1484 (9th Cir., 1995).) On the same
14 point the United States Supreme Court, in Conley v. Gibson 355 U.S. 41, 45-46, 78 S.Ct. 99, 102
15 (1957), has said:

16 "A complaint should not be dismissed for failure to state a claim
17 unless it appears beyond a doubt that the plaintiff can prove no set of
18 facts in support of his claim which would entitle him to relief."

19 The question of plaintiff's ability to prove his allegations is not at issue in a motion for
20 dismissal under Rule 12(b)(6). For example, in citing a US Supreme Court case, the court in
21 Nami v. Fauver 82 F.3d 63, 65 (3rd Cir., 1996) said:

22 "We must determine whether, under any reasonable reading of the
23 pleadings, the plaintiffs may be entitled to relief, and we must accept
24 as true the factual allegations in the complaint and all reasonable
inferences that can be drawn therefrom. [citation omitted] The
25 complaint will be deemed to have alleged sufficient facts if it
adequately put the defendants on notice of the essential elements of
26 the plaintiffs' cause of action. Since this is a Section(s) 1983 action,
the plaintiffs are entitled to relief if their complaint sufficiently
27 alleges deprivation of any right secured by the Constitution. Id. In
considering a Rule 12(b)(6) motion, we do not inquire whether the
28 plaintiffs will ultimately prevail, only whether they are entitled to
offer evidence to support their claims. Scheuer v. Rhodes, 416 U.S.
232, 236 (1974)."

1 With respect to the issue that the court must accept as true all material allegations in the
2 complaint, as well as reasonable inferences to be drawn from them, even if they are unlikely, see
3 also, Pareto v. F.D.I.C. 139 F.3d 696, 699 (9th Cir., 1998).

4 The point here is that the standard that defendant must reach to dismiss the claims for
5 failure to state a cause of action are very high. Defendants have clearly failed to meet its burden as
6 we will demonstrate below.

7 B. Dismissal Must Be Based on Face of Complaint

8 Ordinarily a Rule 12(b)(6) motion cannot be used to raise an affirmative defense.
9 Complaints need not contain any information about defenses and may not be dismissed for that
10 omission. Xechem, Inc. V. Bristol-Myers Squibb Co. (7th Cir. 2004) 372 F.3d 899, 901.

11 In this case defendant have reached out to amendments that it claims were added to the
12 lease agreement. The plaintiff disputes those claims. The Assignment of Lease and Consent of
13 Lessor was never consented to by its own terms. The Assignment depended upon the completion
14 of a document called Amendment No. 2 to Lease that was never executed.

15 A defense to a complaint that would make the complaint subject to a motion to dismiss
16 must be absolute because any conditional defense calls into the question the truth of the allegations
17 and the allegations must be taken as true to the benefit of plaintiff for the purposes of a motion to
18 dismiss under a Rule 12(b)(6) motion. Where the defense disclosed in the complaint is
19 conditional rather than absolute, a Rule 12(b)(6) motion to dismiss should be denied.
20 (McCalden v. California Library Ass'n (9th Cir. 1990) 955 F.2d 1214, 1219.)

21 It is not up to plaintiff to prove its case. It is only necessary to show that if the allegations
22 were proven, it would have a case that was legally sufficient. That is clearly present here. The
23 facts and the allegations of fraudulent motive are clearly stated in the complaint.

24 Unless the court converts the Rule 12(b)(6) motion into a summary judgment motion or the
25 defense is apparent from matters of which the court may take judicial notice, the court cannot
26 consider material outside the complaint. Consideration of declarations or extraneous documents
27 should not be considered as bearing on a motion to dismiss under Rule 12(b)(6) because the
28 allegations of plaintiff are only being tested for their legal sufficiency and all contentions of

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1 plaintiff are taken as true. (Arpin v. Santa Clara Valley Transp. Agency (9th Cir. 2001) 261 F.3d
2 912, 925.)

3 When a complaint's allegations are capable of more than one inference, the court must
4 adopt whichever inference supports a valid claim. Columbia Natural Resources, Inc. v. Tatum (6th
5 Cir. 1995) 58 F.3d 1101, 1109. In this case, defendants seek to establish an inference that an
6 assignment that was never consented to should be taken as having voided and superceded the
7 contract. This is a highly disputed inference and cannot form the basis for a motion to dismiss.

8 The attempts by defendants to seek a de facto summary judgment if the court finds crucial
9 documents extrinsic is completely inappropriate. The plaintiff must be granted time to conduct
10 discovery as to the validity of certain documents as well as many other points. The documents in
11 question are highly disputed and should be the subject of extensive discovery.

12 C. Alter Ego Allegations Support Breach of Contract

13 Plaintiff is informed and believes that CDT Limited and Opsys Limited are the alter egos
14 of each other. Opsys Limited may have acted as the agent of CDT Limited in shedding its
15 liabilities and debt as part of the plan to merge the assets of Opsys Limited into CDT Limited and
16 obtain the assets only. Thus, CDT broke the lease contract with plaintiff and ended up with the
17 assets of Opsys while avoiding the obligations of Opsys Limited contract with plaintiff to the
18 detriment of plaintiff.

19 When a multiplicity of factors clearly support disregard of the corporate fiction on the
20 grounds of equity and fairness, courts have been willing to apply the "alter ego" or instrumentality
21 theory in order to cast aside the corporate shield and to fasten liability. See, Holley v. Crank,
22 386 F.3d 1248 (9th Cir. 2004). That is certainly the case here where the alter ego has been
23 propagated to assist in the breach of contract.

24 Similarly, it has been held that the very fact that the corporation was very thinly capitalized
25 is a relevant factor in applying an alter ego theory. See, Anderson v. Abbott, 321 U.S. 349, 362, 64
26 S.Ct. 531, 88 L.Ed. 793 (1944).

27 In the instant case it is certainly the case that CDT Limited was breaching the contract
28 along with Opsys, but as it was the one with the assets using the Opsys as its alter ego, CDT

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1 Limited must be included in the cause of action in order to redress the injury suffered by plaintiff.

2 Another lien against a bankrupt entity will avail plaintiff nothing.

3 Plaintiff needs to do discovery to lift the corporate veil and find out where the assets of the
4 entity that broke its contract with plaintiff ended up. It is also clear what Peter Howell's role was
5 in it, the contentions of counter-defendant notwithstanding.

6 D. Allegations Support Fraud Cause of Action

7 Defendants' claims that the allegations of fraud lack specificity must be regarded at this
8 point. The prior insufficiency that the court identified was an absence of scienter. The plaintiff
9 has certainly pled scienter at this point. In the court's order the court specifically granted leave to
10 plead that both defendants acted fraudulently in seeking to assign the lease to Opsys US because
11 they knew that Opsys US was insolvent at the time of the assignment. That is of the essence.
12 Both defendants knew that Opsys US was bankrupt and that was the essence of the fraud.

13 The court then stated that plaintiff may include such allegations in an amended complaint
14 if it is able to do so in good faith. That is exactly what plaintiff has done.

15 As we have described, defendants' agents and representative offered plaintiff false
16 financial statements, misrepresented defendants' financial solvency, not to mention concealing the
17 motive and intentions with regard to the breach of the lease. Defendants ignored the temporary
18 restraining order with respect to the premises and ignored a Notice of Violation with respect to
19 violation of environmental regulations. In addition, defendants failed to report to plaintiff
20 mechanics liens against the property in violation of the lease. Most importantly defendants's
21 fraudulent intention cannot be more clear when they concealed from plaintiff the transfer of
22 substantial assets from Opsys Limited to CDT in violation of lease

23 All of these actions taken together indicate that both defendants knew of and actively
24 participated in the fraud against plaintiff.

25 In the alternative, plaintiff requests leave of court to amend the complaint in order to
26 describe in detail the identities of defendants' agents, employees, and officers who made false
27 statements to plaintiff which constitute fraud, detailed verbatim renditions of the actual
28 misrepresentations uttered by defendants' agents and specific dates and locations where the

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1 fraudulent statements were made.

2 Federal Rule of Civil Procedure, Rule 15 requires the court to adopt a very liberal policy
3 toward giving a plaintiff leave to amend the complaint at least once.

4 E. Plaintiff Objects to Review as Summary Judgment

5 Defendants again state that if the court considers some of the documents extrinsic, then
6 they would be review by the court under the standard for summary judgment. This is preposterous
7 and a severe attack on plaintiff's right to do discovery and have its chance to prove its case. There
8 are severe limitations to the type of documents that may be attached to a motion to dismiss under
9 Rule 12(b)(6). Documents that are quoted in part by the complaint or are referred to in the
10 complaint but not included may be used in a Rule 12(b)(6) motion if no party questions the
11 authenticity of the document. See Branch v. Tunnell (9th Cir. 1994) 14 F.3d 449, 454, and In re
12 Stac Electronics Securities Litig. (9th Cir. 1996) 89 F.3d 1399, 1405.).

13 On the other hand, where the complaint alleges a contract the court may not consider
14 documents that are not indisputably the basis for the alleged contract. (BJC Health System v.
15 Columbia Cas. Co. (8th Cir. 2003) 348 F.3d 685, 687.) Of course, the assignment of the lease,
16 which is highly disputed and never became effective on its face because it was not consented to by
17 plaintiff, cannot now be brought in as the basis for a motion to dismiss. The assignment of the
18 lease goes to the nature of the fraud not the nature of the contract. Seeking a dismissal based on
19 such disputed documents is clearly preposterous and well outside the scope of what can
20 legitimately become a part of a motion to dismiss under Rule 12(b)(6).

21 At this stage in the proceedings any ambiguity in the documents must be resolved in
22 plaintiff's favor. International Audiotext Network, Inc. v. AT&T Co. (2nd Cir. 1995) 62 F.3d 69,
23 72. The documents relied upon by defendants in this case are highly disputed as to their validity
24 and import. That those documents should be considered by the court under the premise that they
25 are a part of the contract is both preposterous and unfounded.

26 It is true that judicial notice may be taken of official records and reports. MGIC Indem.
27 Corp. v. Weisman (9th Cir. 1986) 803 F.2d 500, 504. However, contested assignments and
28 amendments to a lease that were never executed or consented to, and never became effective are

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1 not "official records" in that sense.

2 It is clear that defendants' motion to dismiss attempts to carve out some special ground
3 half way between a motion to dismiss and a summary judgment where defendants get the
4 advantages of a motion to dismiss without the burden of proof in a summary judgment and without
5 plaintiff having a chance to propound the discovery that would be necessary and to which the
6 plaintiff is entitled. When a motion to dismiss is converted to a motion for summary judgment by
7 reference to extrinsic evidence, summary judgment requirements apply and the opposing party
8 must be provided a reasonable opportunity to present material relevant to a Rule 56 motion.
9 (Cunningham v. Rothery (9th Cir. 1998) 143 F.3d 546, 549.)

10 Implicit in the opportunity to respond to summary judgment is the requirement that
11 sufficient time be afforded for discovery purposes to develop facts essential to justify a party's
12 opposition to the motion. (Portland Retail Druggists Ass'n v. Kaiser Foundation Health Plan (9th
13 Cir. 1981) 662 F.2d 641, 645.)

14 Again, it is of the essence that plaintiff needs to do discovery to lift the corporate veil and
15 find out where the assets of the entity that broke its contract with plaintiff ended up. This is
16 inappropriate under the standards for motion to dismiss, and plaintiff must have a chance to do
17 discovery.

18 IV. CONCLUSION

19 Therefore, the overwhelming conclusion is that the plaintiff has stated facts sufficient to
20 meet the threshold of pleading for claims of breach of contract and fraud. A motion to dismiss
21 under Rule 12(b)(6) cannot be based on documents outside the face of the complaint that are
22 highly disputed as to their validity, relevance and meaning. A motion for summary judgment
23 would be highly inappropriate as defendants have not answered and plaintiff must be granted time,
24 at the very least to conduct discovery as to the facts.

25 The motion for dismissal should be rejected by this court and the defendants should be
26 required to answer the complaint.

27 DATED: June 27, 2005

LAW OFFICES OF STANLEY G. HILTON

28 By _____ /s/
Stanley G. Hilton, Attorney for Plaintiff

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EXHIBIT F

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SUNNYSIDE DEVELOPMENT
COMPANY, LLC,

No. C 05-0553 MHP

Plaintiff,

v.

OPSYS LIMITED and CDT LIMITED,

MEMORANDUM & ORDER
Re: Defendants' Motion to Dismiss

Defendants.

On December 14, 2004, plaintiff Sunnyside Development Company, LLC filed this action for breach of contract and fraud in state court, naming Opsys Limited and CDT Limited as defendants. That action was subsequently removed to this court, and defendants now move for partial dismissal of plaintiff's first amended complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). Having considered the parties' arguments and for the reasons stated below, the court enters the following memorandum and order.

BACKGROUND¹

Plaintiff Sunnyside Development Company is the lessor of a commercial property located at 47375 Fremont Boulevard in Fremont, California. On February 15, 2001, plaintiff agreed to lease commercial space at the Fremont Boulevard property to defendant Opsys Limited, with the lease term running from May 1, 2001 through April 30, 2008. Pursuant to the conditions of the lease

1 agreement, Opsys Limited agreed to pay plaintiff a monthly base rent, to make certain capital
2 improvements, and to conduct its business in an environmentally safe manner.

3 Opsys Limited continued to make rental payments to plaintiff until October 2002. At that
4 time, defendant CDT Limited ("CDT") acquired control of Opsys' British business, Opsys UK
5 Limited ("Opsys UK"). As part of the corporate reorganization accompanying that transaction,
6 plaintiff, Opsys Limited, and Opsys' United States subsidiary, Opsys US, signed a novation
7 agreement that purportedly assigned Opsys Limited's rights and obligations under the lease to Opsys
8 US. Under the terms of paragraph six of the novation agreement, the assignment was subject to a
9 number of conditions precedent, including a provision requiring that both parties execute a second
10 amendment to the lease.

11 Plaintiff received no rental payments after October 2002, and Opsys US was forced into
12 involuntary bankruptcy by four of its creditors in May 2003. On December 14, 2004, plaintiff filed
13 this action in the Superior Court for Alameda County, pleading causes of action for breach of
14 contract and fraud under California law. That action was subsequently removed to this court, and on
15 February 28, 2005, defendants moved to dismiss plaintiff's complaint pursuant to Federal Rule of
16 Civil Procedure 12(b)(6), arguing that plaintiff had failed to state a claim under either of the asserted
17 causes of action. With respect to plaintiff's breach of contract claims, defendants argued that CDT
18 was never a party to the Fremont Boulevard lease and that Opsys Limited had been released from its
19 obligations under the lease agreement by the October 2002 novation agreement. As for plaintiff's
20 fraud claim, defendants argued that plaintiff had failed to plead the elements of fraud with
21 particularity, as is required by Federal Rule of Civil Procedure 9(b).

22 On April 22, 2005, the court issued an order granting defendants' motion in part and denying
23 it in part. Specifically, the court agreed with defendants that plaintiff's complaint fails to allege that
24 CDT had ever been a party to the lease agreement, thus warranting dismissal of the breach of
25 contract claim against CDT. The court also dismissed the fraud claims against both defendants on
26 the ground that plaintiff had failed to satisfy the pleadings requirements of Rule 9(b). However, in
27 considering the breach of contract claim against Opsys Limited, the court rejected defendants'

1 argument that the terms of the novation agreement warranted granting their motion to dismiss.
2 Specifically, the court concluded that because defendants had failed to submit a signed copy of the
3 second amendment to the lease, it could not be determined from the face of the pleadings whether all
4 of the conditions precedent to releasing Opsys Limited from liability for failure to comply with the
5 conditions of the lease had been fulfilled.² Thus, drawing all reasonable inferences in favor of the
6 nonmoving party, the court held that plaintiff had stated a claim for breach of contract against Opsys
7 Limited.

8 On May 11, 2005, plaintiff filed an amended complaint, having been granted leave to do so
9 for the purpose of curing the deficiencies in the December 2004 complaint that the court had
10 identified in its April 2005 order. In the amended complaint, plaintiff again pleads causes of action
11 for breach of contract and fraud against both defendants. However, in contrast to plaintiff's prior
12 pleadings, the amended complaint now alleges that Opsys Limited acted as the alter ego of CDT in
13 entering into and breaching the lease agreement, thereby entitling plaintiff to recover damages for
14 breach of contract from CDT as well as from Opsys. As for plaintiff's fraud claims, the gravamen of
15 those claims continues to lay, as it did in the initial complaint, in plaintiff's theory that Opsys
16 Limited induced plaintiff to enter into the February 2001 lease agreement without ever having any
17 intention to perform its obligations as lessee of the Fremont Boulevard property, although plaintiff
18 now seeks to overcome the hurdle posed by Rule 9(b)'s particularity requirement by identifying
19 several of Opsys Limited's officers as the source of the actionable misrepresentations that defendants
20 allegedly made.

21 On May 31, 2005, defendants moved for partial dismissal of the amended complaint, arguing
22 that plaintiff had again failed to state a claim for breach of contract against CDT or to plead
23 adequately the required element fraud against either defendant. The following memorandum and
24 order addresses those arguments.

1 LEGAL STANDARD

2 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) “tests the legal
3 sufficiency of a claim.” Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001). Unless it appears
4 beyond doubt that a plaintiff can prove no set of facts in support of her claim which would entitle her
5 to relief, a motion to dismiss must be denied. Lewis v. Telephone Employees Credit Union, 87 F.3d
6 1537, 1545 (9th Cir. 1996) (citation omitted); see also Conley v. Gibson, 355 U.S. 41, 45-46 (1957).
7 When assessing the legal sufficiency of a plaintiff’s claims, the court must accept as true all material
8 allegations of the complaint, and all reasonable inferences must be drawn in favor of the non-moving
9 party. See Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996) (citations omitted).
10 Dismissal is proper under Rule 12(b)(6) “only where there is no cognizable legal theory or an
11 absence of sufficient facts alleged to support a cognizable legal theory.” Navarro, 250 F.3d at 732
12 (quoting Balistreri v. Pacifica Police Dep’t, 901 F.2d 696, 699 (9th Cir. 1988)).

13
14 DISCUSSION

15 I. Breach of Contract (Against CDT)

16 Defendants first move to dismiss plaintiff’s breach of contract claim against CDT. While
17 plaintiff concedes that CDT is not a party to the lease agreement that is the subject of its breach of
18 contract claims, it nevertheless asserts that Opsys Limited acted as CDT’s alter ego in entering into
19 and subsequently breaching the lease. Thus, according to plaintiff, the court should pierce CDT’s
20 corporate veil and hold it liable for Opsys Limited’s failure to perform its contractual duties.

21 As an initial matter, the court notes that although neither party has addressed the issue of
22 choice of law, CDT is incorporated in the United Kingdom. As there is no relevant contractual
23 choice of law provision, the choice of law issue turns on whether the law of the forum state or the
24 law of CDT’s place of incorporation should govern the alter-ego inquiry. In this diversity action, the
25 answer to that question must be determined based on California choice of law rules. See Klaxon Co.
26 Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941).

1 In Schlumberger Logelco, Inc. v. Morgan Equipment Co., No. C 94-1776 MHP, 1996 WL
2 251951 (N.D. Cal. May 3, 1996) (Patel, J.), this court considered a similar issue arising from a
3 plaintiff's attempt to hold an Austrian corporation liable for breach of contract and various torts
4 under an alter-ego theory. See id. at *1, *3. Applying the "governmental interest" analysis that
5 California courts employ in adjudicating choice of law issues, see In re Yagman, 796 F.2d 1165,
6 1170 (9th Cir. 1986), amended on denial of reh'g, 803 F.2d 1085 (9th Cir. 1986), cert. denied, 484
7 U.S. 963 (1987), the court observed that Austria, as the state of incorporation, had "a substantial
8 interest in determining whether to pierce the corporate veil of one of its corporations."
9 Schlumberger, 1996 WL 251951, at *3. The court therefore concluded that Austrian law supplied
10 the rules of decision for determining whether to hold the defendant corporation liable under an alter-
11 ego theory. Id. at *4.

12 In the absence of any attempt by either party to brief the choice of law issue, the court sees no
13 reason to depart from the analysis set forth in the Schlumberger case. Thus, applying that analysis in
14 the case at bar, the court must look to British corporations law for the purpose of determining
15 whether plaintiff has alleged facts that support piercing CDT's corporate veil.³ In essence, the theory
16 of alter-ego liability set forth in the amended complaint turns on allegations that defendants entered
17 into secret negotiations in early 2001, pursuant to which CDT sought to acquire Opsys Limited's
18 British operations and to divest itself of any liability associated with the target company's American
19 business, including Opsys' contractual liability to plaintiff. According to plaintiff, the allegations
20 concerning this collaboration, which it alternatively characterizes as a conspiracy to breach the lease
21 agreement,⁴ are sufficient to permit a finding that Opsys Limited acted as CDT's alter-ego in its
22 dealings with plaintiff.

23 The court finds this argument unavailing. Certainly, the corporations law of the United
24 Kingdom recognizes circumstances where a corporate subsidiary can be considered the alter ego of
25 its parent corporation. See Palmer's Company Law § 2.1519 ¶ 11 (2004) (observing that "there are
26 many cases in which the distinction between parent and subsidiary company has been ignored by the
27 court"). It nevertheless remains true that piercing the corporate veil under British law generally
28

1 requires that the parent exercise a significant degree of control over the subsidiary, going beyond
2 mere formal ownership and coordination of corporate strategies and extending to the direct
3 supervision of the subsidiary's day-to-day business activities. See, e.g., Adams v. Cape Indus., Plc.,
4 [1990] Ch. 433 (holding that facts establishing a disregard for corporate formalities among members
5 of an integrated mining group and the parent's strategic supervision of the subsidiary in question
6 were not sufficient to pierce the parent's corporate veil under an alter-ego theory). In any event,
7 plaintiff does not allege that the parent-subsidary relationship in question even existed at the time
8 that it entered into the lease agreement with Opsys Limited, much less that the relationship was one
9 in which the parent controlled the affairs of the subsidiary to such an extent as would justify piercing
10 CDT's corporate veil. In fact, the court is unaware of any authority, in British law or otherwise, that
11 would permit it to pierce the veil of an acquiring corporation based on the facts alleged in the
12 amended complaint, and plaintiff has done nothing to assist the court in identifying any authority that
13 so holds. For that reason, the court must conclude that the allegations in plaintiff's amended
14 complaint do not support holding CDT liable for the breach of contract under an alter-ego theory.

15 This alone is sufficient to justify dismissal of plaintiff's breach of contract claim against
16 CDT. In addition, defendants correctly point out that plaintiff's alter-ego theory is premised upon
17 allegations of fraudulent conduct. As the Ninth Circuit observed in Vess v. Ciba-Geigy Corp. USA,
18 317 F.3d 1097 (9th Cir. 2003), such allegations are deemed to "sound in fraud" even if they are
19 pleaded in support of a cause of action in which fraud is not a required element. See id. at 1103-04.
20 Consequently, a plaintiff alleging a fraudulent course of conduct to support such a claim must satisfy
21 the heightened pleading standard of Federal Rule Civil Procedure 9(b), id., which requires that the
22 circumstances constituting fraud be pleaded with particularity. Fed. R. Civ. Pro. 9(b). Moreover,
23 where, as here, a plaintiff levels allegations of fraud against more than one defendant, Rule 9(b)
24 "requires that a plaintiff plead with sufficient particularity attribution of the alleged
25 misrepresentations or omissions to each defendant." In re Silicon Graphics, Inc. Sec. Litig., 970
26 F.Supp. 746, 752 (N.D. Cal. 1997) (Smith, J.). That requirement is clearly not satisfied by plaintiff's
27 allegations against CDT, as the only particularized allegations of fraud in the amended complaint
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1 involve the conduct of Opsys Limited and its officers. Thus, even if the facts that plaintiff has
2 alleged would permit a jury to hold CDT liable under an alter-ego theory (and they do not), those
3 allegations are not pleaded with adequate specificity to withstand a motion to dismiss under Rule
4 9(b). Thus, for this reason, as well as for the reasons stated above, the court holds that plaintiff's
5 breach of contract claim against CDT must be dismissed.

6 II. Fraud (Against Both Defendants)

7 _____ The second issue raised by defendants' motion to dismiss requires the court to consider
8 whether plaintiff's amended complaint states a claim for fraud. Under California law, the elements
9 of fraud are (1) a misrepresentation by the defendant; (2) knowledge of falsity (scienter); (3) intent to
10 induce reliance; (4) justifiable reliance; and (5) resulting damage. Bank of the West v. Valley Nat'l
11 Bank of Ariz., 41 F.3d 471, 477 (9th Cir. 1994) (citation omitted) (applying California law).
12 Defendants argue that plaintiff's amended complaint fails to allege at least two of these elements, the
13 existence of an actionable misrepresentation and scienter, and thus urges the court to dismiss the
14 fraud claims that plaintiff has leveled against both Opsys Limited and CDT.

15 Before turning to the substance of those allegations, the court notes that while plaintiff
16 repeatedly alleges that "defendants" engaged in fraudulent conduct, nothing in the amended
17 complaint identifies any specific false or misleading statement that CDT or its employees or agents
18 might have made in connection with the Fremont Boulevard lease. As the court has previously
19 noted, such generalized allegations of fraud are not sufficient to state a claim under Federal Rule of
20 Civil Procedure 9(b). Moreover, the preceding discussion makes it equally clear that CDT cannot be
21 held liable for any fraudulent acts that Opsys Limited might have committed in the course of its
22 dealings with plaintiff. Thus, for the same reasons that plaintiff is unable to state a claim for breach
23 of contract against CDT, the fraud claim against CDT must also be dismissed.

24 That leaves the court to consider whether plaintiff can state a claim for fraud against Opsys
25 Limited. As noted above, Federal Rule of Civil Procedure 9(b) requires that "the circumstances
26 constituting fraud or mistake shall be stated with particularity." Fed. R. Civ. P. 9(b). Under Ninth
27 Circuit law, those "circumstances" include the precise "time, place, and nature of the misleading
28

1 statements, misrepresentations, [or] specific acts of fraud.” Kaplan v. Rose, 49 F.3d 1363, 1370 (9th
2 Cir. 1994) (citations omitted), cert. denied, 516 U.S. 810 (1995). In addition, the Ninth Circuit has
3 observed that plaintiffs seeking to satisfy Rule 9(b) must “set forth an explanation as to why the
4 statement or omission complained of was false and misleading.” In re Glenfed, Inc. Sec. Litig., 42
5 F.3d 1541, 1548 (9th Cir. 1994) (en banc).

6 What plaintiff has alleged in the amended complaint is in essence a claim for promissory
7 fraud. Specifically, plaintiff asserts that at or about the time that the February 2001 lease agreement
8 was signed, Opsys Limited CEO Gary Rhea and other representatives of “defendants” made
9 promises to comply with the conditions of that agreement without ever having any intention of
10 keeping that promise. Pl.’s Am. Compl. ¶ 15. There is little doubt that these alleged
11 misrepresentations are sufficiently specific so as to permit defendants to identify the circumstances
12 of the alleged fraud and to answer plaintiff’s amended complaint, which would generally be enough
13 to satisfy the requirements of Rule 9(b). See Fecht v. Price Co., 70 F.3d 1078, 1082 (9th Cir. 1995),
14 cert. denied, 517 U.S. 1136 (1996); see also Vess, 317 F.3d at 1106 (citation and original alteration
15 omitted) (noting that Rule 9(b) requires a plaintiff to allege facts that are “specific enough to give
16 defendants notice of the particular misconduct so that they can defend against the charge and not just
17 deny that they have done anything wrong”). The court thus finds that plaintiff has adequately
18 pleaded at least one actionable misrepresentation.

19 That being the case, a plaintiff seeking to state a claim for fraud must also plead knowledge
20 of falsity, or scienter. See GlenFed, 42 F.3d at 1546. It is true that the requirement for pleading
21 scienter is less rigorous than that which applies to allegations regarding the “circumstances that
22 constitute fraud,” as Rule 9(b) states that “[m]alice, intent, knowledge, and other condition of mind
23 of a person may be averred generally.” Fed. R. Civ. P. 9(b). Nonetheless, nothing in the Federal
24 Rules of Civil Procedure relieves a plaintiff of the obligation to “set forth facts from which an
25 inference of scienter could be drawn.” Cooper v. Pickett, 137 F.3d 616, 628 (9th Cir. 1997) (quoting
26 Glenfed, 42 F.3d at 1546). In the complaint at issue here, the sum of the “facts” tending to show
27 scienter is a reference to the existence of “much evidence” that Opsys Limited never intended to
28

1 perform its obligations under the lease agreement. Pl.'s Am. Compl. ¶ 15. Even when viewed in the
2 light most favorable to plaintiff, such a conclusory statement falls well short of what would be
3 required to permit a reasonable finder of fact to infer that Opsys Limited was acting with fraudulent
4 intent when it entered into the lease agreement in February 2001.

5 Other than the above-cited allusion to "evidence" of defendants' intent to defraud, the sole
6 basis for inferring scienter from the allegations in the amended complaint is premised upon
7 plaintiff's assertion that Opsys Limited promised to comply with the terms of the lease agreement
8 but failed to do so. However, the mere fact that a party breaches a promise to perform a condition of
9 contract is as a matter of law insufficient to give rise to an inference that the breaching party acted
10 with fraudulent intent at the time that the promise was made. See Tenzer v. Superscope, Inc., 39
11 Cal. 3d 18, 30 (1985) (quoting People v. Ashley, 42 Cal. 2d 246, 263 (1954)) (noting that
12 "something more than nonperformance is required to prove the defendant's intent not to perform his
13 promise"). Thus, seeing that plaintiff has made no effort to allege facts beyond Opsys Limited's
14 failure to perform as promised in its attempt to plead the scienter element of common law fraud, the
15 court is compelled to conclude that plaintiff's fraud claims against both defendants fail as a matter of
16 law. The court therefore grants defendants' motion for partial dismissal in its entirety.

17 III. Leave to Amend

18 The sole remaining issue is whether, in light of the foregoing discussion, plaintiff should be
19 given leave to file a second amended complaint. In determining whether it should grant leave to
20 amend a complaint, the court must consider (1) the plaintiff's bad faith; (2) undue delay; (3)
21 prejudice to the defendant; (4) futility of amendment; and (5) whether the plaintiff has previously
22 amended his or her pleadings. Nunes v. Ashcroft, 375 F.3d 805, 808 (9th Cir. 2004) (citing Bonin v.
23 Calderon, 59 F.3d 815, 845 (9th Cir. 1995)), reh'g and reh'g en banc denied, 375 F.3d 810 (9th Cir.
24 2004), cert. denied, ___ U.S. ___, 125 S. Ct. 1395 (2005). Here, plaintiff has already failed in two
25 attempts to plead facts that might lend support to its conclusory allegations regarding defendants
26 purportedly fraudulent and conspiratorial conduct. Because there is no reason to believe that a third
27 attempt to do so would be any more successful than the first two, the court sees no reason to grant
28


1 plaintiff leave to amend its pleadings. Accordingly, the court holds that plaintiff's breach of contract
2 claim against CDT and its fraud claims against both defendants should be dismissed with prejudice.

3
4 CONCLUSION

5 For the foregoing reasons, defendants' motion for partial dismissal is GRANTED. Plaintiff's
6 claims for breach of contract against defendant CDT and its claims for fraud against both defendants
7 are hereby DISMISSED WITH PREJUDICE.

8 IT IS SO ORDERED.

9
10 Dated: August 8, 2005

11 
12 MARILYN HALL PATEL
13 District Judge
14 United States District Court
15 Northern District of California
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For the Northern District of California
DISTRICT
COURT

ENDNOTES

1. All facts are drawn from plaintiff's first amended complaint and from the documents incorporated by reference therein.
2. The court also rejected defendants' argument that plaintiff was judicially estopped from denying the validity and enforceability of the novation agreement.
3. It should be noted that under California choice of law rules, the court need only reach the question of "governmental interest" if the substantive law of the foreign jurisdiction differs materially from California law. See Abogados v. AT&T, Inc., 223 F.3d 932, 934 (9th Cir. 2000) (applying California choice of law rules). It is at least debatable that the scope of the United Kingdom's veil-piercing doctrine is broader than its California equivalent. Compare Palmer's Company Law § 2.1519 ¶ 11 (2004) (observing that "[i]t has sometimes been argued that there is emerging in English and Scottish law a general principle that all companies in a group of companies will be treated as a single entity"), with American Tel. & Tel. Co. v. Compagnie Bruxelles Lambert, 94 F.3d 586, 591 (9th Cir. 1996) (citations and original alterations omitted) (noting that under California law, a parent corporation will be held liable for the debts of its subsidiary under an alter-ego theory only if the plaintiff proves "(1) that there is such unity of interest and ownership that the separate personalities of [the parent and subsidiary corporations] no longer exist and (2) that failure to disregard their separate identities would result in fraud or injustice"). In any event, as the court finds that British law does not permit CDT's corporate veil to be pierced in the instant action, its conclusion would not change if California law supplied the rules of decision with respect to the alter-ego issue.
4. Plaintiff's amended complaint also characterizes CDT's conduct as tortious interference with contractual relations. Pl.'s Am. Compl. ¶ 11. However, because plaintiff has failed to plead that cause of action, the court need not consider whether it has stated a claim under that theory.

UNITED
For the Northern District of California

DISTRICT

COURT

EXHIBIT G

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UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA

SUNNYSIDE DEVELOPMENT COMPANY,)
 LLC,)

Plaintiff,

v.

OPSYS LIMITED, a United Kingdom)
 Company,)

Defendants.)

No. C 05-00553 MHP

**NOTICE OF MOTION AND
 MOTION FOR LEAVE TO FILE A
 SECOND AMENDED COMPLAINT
 AND/OR TO JOIN A RELATED
 PARTY AS SUCCESSOR-IN-
 INTEREST; MEMORANDUM OF
 POINTS AND AUTHORITIES IN
 SUPPORT THEREOF**

[F.R.C.P. Rules 15(a) and 25(c)]

Hearing Date: December 12, 2005
 Time: 2:00 p.m.
 Dept: 15

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

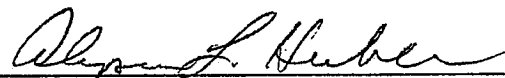
PLEASE TAKE NOTICE that on December 12, 2005 at 2:00 p.m. or as soon thereafter as the matter may be heard before the Honorable Marilyn H. Patel, United States District Judge, in Courtroom 15 of the above entitled Court, plaintiff Sunnyside Development Co., LLC ("Sunnyside") will move, and hereby does move the Court pursuant to F.R.C.P. Rule 15(a) for leave to file a second amended complaint for breach of contract against Opsys Limited and add Cambridge Display Technologies, Inc. ("Cambridge") as its successor-in-interest as a party, pursuant to general principles of successor liability and pursuant to F.R.C.P. Rule 25(c).

1 Plaintiff requests leave to file a Second Amended Complaint to conform to the
2 previous orders of this Court granting Opsys Limited's Rule 12(b)(6) motion to dismiss, and to add
3 the successor-in-interest to Opsys Limited as a party. Cambridge completed its acquisition of
4 defendant Opsys Limited on December 29, 2004, after this action was filed.

5 This motion will be based on this Notice of Motion and Motion, the Memorandum
6 of Points and Authorities, the accompanying Declaration of Alyson L. Huber and Request for
7 Judicial Notice submitted herewith, including the proposed Second Amended Complaint at Exh. A
8 thereto, the complete files and records herein, and on the argument and other evidence to be
9 presented at the hearing of this matter.

10 DATED: November 2, 2005

BARTKO, ZANKEL, TARRANT & MILLER
A Professional Corporation

By: 
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RJN 74

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RJN 76

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Following this Court's Rule 12(b)(6) orders, this case presents a narrow claim for
 4 breach of a commercial lease. Since the filing of the initial complaint, the defendant lessee has
 5 been fully acquired by a public company, Cambridge Display Technologies, Inc. ("Cambridge").
 6 Plaintiff seeks leave to file a Second Amended Complaint ("SAC") to allege the successor liability
 7 of Cambridge and to clarify the bases of liability that remain, including why the purported
 8 assignment of the lease to a bankrupt affiliate of the defendants was never effective. A clear
 9 amended complaint is in the interests of the Court, the parties, and the administration of justice.

10 Frankly, this motion should not have been required. At the direction of the Court,
 11 plaintiff provided the proposed SAC to defendants' counsel who declined to stipulate to its filing,
 12 necessitating this motion. Filing the SAC, of course, would have preserved to defendants all
 13 defenses, pleading and otherwise. While the case is not complex -- establishing the liability of a
 14 defunct commercial lessee and its successor, versus their defense that the lease was assigned to an
 15 undercapitalized shell company -- the proposed SAC surely lays out in sufficient detail under the
 16 federal rules the facts and theories of liability, which are sound as a matter of pleading and
 17 supported by substantial evidence. There has been no deposition discovery and no production of
 18 any meaningful documents from the defense. Yet defendants apparently oppose leave to file the
 19 SAC or naming the successor party by arguing the merits on a pleading record.

20 Simply, the Court should grant leave to file the SAC -- which only asserts a breach
 21 of contract claim -- and allow this case to proceed to any pleadings challenges, prompt discovery
 22 and hopefully resolution. As admitted in SEC filings, Cambridge succeeded to *all* assets of the
 23 lessee (the value of which could have paid rent to plaintiff), and is holding treasury stock of
 24 significant value payable to the shareholders of the original lessee as security for its potential
 25 liability in this case. A clearer case for naming a successor in a breach of contract case is hard to
 26 imagine.

27 **RJN 77**

1 **II. ISSUES TO BE DECIDED**

2 (1) Should plaintiff be allowed to amend its complaint, after substituting counsel,
3 to clarify its claims and conform to this Court's Order granting defendant's 12(b)(6) motion?

4 (2) Should plaintiff be allowed to join the successor-in-interest to Opsys Limited?

5 **III. RELEVANT FACTS**

6 **A. Procedural History**

7 On December 14, 2004, plaintiff filed an action in Alameda County Superior Court.
8 See Declaration of Alyson L. Huber and Request for Judicial Notice (hereafter "Huber Decl."),
9 Exh. E. On February 7, 2005, defendants Opsys Limited and CDT Limited removed to this Court,
10 and then moved to dismiss. On April 22, 2005, the Court granted in part and denied in part,
11 defendants' motion with leave to amend.

12 On May 11, 2005, plaintiff filed a First Amended Complaint asserting breach of
13 contract against Opsys Limited, alter ego liability as to CDT Limited and fraud claims against both
14 companies. Defendants filed a motion dismiss all claims except the breach of contract claim
15 against Opsys Limited. On August 8, 2005, the Court granted defendants' motion without leave to
16 amend, effectively dismissing CDT Limited and leaving only a breach of contract claim remaining
17 against Opsys Limited.

18 On August 26, 2005, plaintiff filed papers to substitute new counsel, and on
19 September 9, 2005 that application was granted. Counsel appeared October 3, 2005 at a Case
20 Management Conference and informed the Court that plaintiff was seeking a stipulation to add a
21 publicly traded Delaware company, Cambridge, to this case as successor to Opsys Limited and
22 suggested that a second amended complaint be filed to clarify plaintiff's allegations and add the
23 successor-in-interest. The Court ordered the parties to meet and confer on a stipulation, and if one
24 could not be attained plaintiff to file a motion for leave to file the amended complaint, on 35 days
25 notice.

26 In compliance, plaintiff sought defendant Opsys Limited's stipulation to file a
27 second amended complaint that added Cambridge as a defendant and re-pleaded with clarity the
28

1 breach of contract claim and the reasons assignment by the lessee was not effective. *See* Huber
 2 Decl. at ¶ 2, Exh. B. Defendant refused to stipulate. *Id.* Plaintiff now requests that the Court
 3 allow plaintiff to file the SAC attached to the Huber Declaration as Exhibit A.

4 B. The Lease and the Successor Transactions

5 This case involves both breach of lease, and a series of international transactions
 6 intertwined with the breach. On or about February 15, 2001, plaintiff and defendant Opsys
 7 Limited entered into a written lease agreement ("Lease") for a term of seven years and three
 8 months beginning May 1, 2001. *See* First Amended Complaint at ¶ 8.

9 In 2002, Opsys Limited apparently had two subsidiaries, Opsys UK and Opsys US.
 10 *See* Declaration of Michael Holmes filed February 28, 2005 in Support of Defendants' Motion to
 11 Dismiss at ¶¶ 3, 4. In October 2002, a Cambridge affiliate known as Cambridge Display
 12 Technology Limited ("CDT Limited") acquired 16% of the stock and management control of
 13 Opsys UK (which later changed its name to "CDT Oxford Limited"), with an option to purchase
 14 Opsys Limited (the lessee here and the owner of the key IP Opsys assets) if certain conditions
 15 were met. *See* Huber Decl., Exh. F, § 9.4. This option to purchase was exercised on
 16 December 29, 2004, after the complaint was filed in this action. *See* Huber Decl., Exh. I, p. 2.¹

17 Cambridge reports this lawsuit in its SEC filings, and advises publicly that it
 18 maintains in escrow portions of the consideration payable to Opsys Limited shareholders in the
 19 event plaintiff obtains a judgment against Cambridge for Opsys Limited's liability. *See* Huber
 20 Decl., Exh. K at p. 8. The most recent 10-Q states:

21 In the event that the Company suffers a loss in relation to either of
 22 the claims against Opsys Limited, shares currently held in escrow
 23 will be forfeited to the value of the loss, as measured at the
 24 December 2004 initial public offering price of \$12.00 per share. The
 value of the 422,610 shares held in escrow, based on the market
 price of \$7.74 per share at June 30, 2005, is \$3.3 million. The escrow

25 ¹ On January 5, 2005, Cambridge filed form 8-K with the SEC, reporting that on December
 26 29, 2004, fifteen days after plaintiff filed its complaint, Cambridge issued its own stock to
 27 purchase Opsys Limited pursuant to the option agreement between CDT Limited, Opsys UK a.k.a.
 28 CDT Oxford Limited, and Opsys Limited. Thus the series of transactions that began no later than
 the fall of 2002 were completed by year-end 2004, and all of Opsys has been folded into
 Cambridge. The reasons for this strategic merger, i.e. acquiring the target's key technologies, are
 described in the SAC at ¶¶ 24-26.

shares are authorized and issued in the accompanying financial statements. Costs that the Company incurs in relation to the claims described above are charged to operating expense as incurred. *Id.* at p. 8.

Plaintiff thus has ample reason to believe Opsys Limited is inactive, and obviously Cambridge is now the interested party. The current pleading adequately provides notice to Opsys Limited and to Cambridge regarding successor liability and the underlying breaches of contract, and is fully consistent with the goals of the federal rules to resolve in one forum this dispute.²

IV. ARGUMENT

A. The SAC Details the Contract Claim and Successor Liability.

1. The Bases for Breach of Contract and Ineffective Assignment are Clearly Stated

The First Amended Complaint had asserted claims for fraud in the inducement, which might be confusing following this Court's August 8, 2005 Order granting defendants' Rule 12(b)(6) motion. The SAC eliminates this claim, and specifically calls out the sections of the Lease that plaintiff contends were breached and which actions constitute a breach of the covenant of good faith and fair dealing, as well as why the defense of assignment of the Lease will not lie. Paragraph 9 of the SAC sets forth the following material Lease obligations implicated in the breach of contract claim:

(a) Opsys Limited **agreed to pay rent** as set forth in ¶ 52 of the Lease, approximately \$73,148 per month for the first year, and subject to annual monthly rent increases thereafter of Y2: \$76,806; Y3: \$80,646; Y4: \$84,678; Y5: \$88,912; Y6: \$93,358; and Y7: \$98,026;

(b) ¶ 7.3(c) of the Lease **prohibited** Opsys Limited from **incurring any liens or encumbrances** against the leased Premises during the term of the Lease, including mechanics liens;

(c) ¶ 13.1 of the Lease required Opsys Limited to be in **compliance with all material terms** and conditions of the Lease at all times;

(d) **Unconsented assignment increased base rent to 110%** pursuant to the Lease at ¶ 12.1(d), and assignment, whether obtained through consent or not,

² If Cambridge is not made a party, then plaintiff would proceed here to judgment against a defunct shell and then have to enforce the judgment in a subsequent action. That is neither sensible nor the law.

shall not "(ii) release Lessee of any obligations hereunder; or (iii) alter the primary liability of Lessee for the payment of Rent or for the performance of any other obligations to be performed by Lessee," pursuant to ¶ 12.2(a);

(e) Pursuant to the Lease at ¶ 53, Opsys Limited agreed to **grant plaintiff warrants for 5,000 common shares of Opsys Limited** at the same price as the then latest round of equity investment;

(f) Opsys Limited agreed to **pay all utilities and real property taxes** applicable to the Premises, pursuant to the Lease at ¶¶ 10, 11;

(g) Opsys Limited agreed to **pay a late charge of 10%** on rent payments more than 5 days delinquent and an additional interest payment of prime plus 4% up to the maximum rate allowed by law running from the date when the rent was due pursuant to the Lease at ¶¶ 13.4, 13.5;

(h) ¶ 6.2 of the Lease required Opsys Limited to **disclose to plaintiff the use of certain Hazardous Substances** on the Premises and to comply with all laws related thereto, and Opsys Limited agreed to **indemnify plaintiff** "against any and all loss of rents and/or damages, liabilities, judgments, claims, expenses penalties, and attorney's and consultants' fees arising out of or involving any Hazardous Substance brought onto the Premises by or for Lessee, or any third party . . . ;"

(i) Opsys Limited specifically agreed that the Hazardous Substances indemnity includes ". . . the cost of investigation, removal, remediation, restoration and/or abatement, and shall survive the expiration or termination of this lease." In bold typeface, ¶ 6.2 states: "**No termination, cancellation or release agreement entered into by Lessor and Lessee shall release Lessee from its obligations under this Lease with respect to Hazardous Substances**, unless specifically so agreed by Lessor in writing at the time of such agreement;"

(j) Lessor's acceptance of **rent** or performance of the Lease **by a third party** "shall [not] constitute a waiver or estoppel of Lessor's right to exercise its remedies for Lessee's Default or Breach" pursuant to the Lease at ¶ 12.2(b); and

(k) The Lease at ¶ 31 also provides that any party that brings an action or proceeding to enforce the terms of the Lease "shall be entitled to **reasonable attorney's fees**."

The SAC next sets out the history of the attempted assignment, how Opsys Limited breached the covenant of good faith and fair dealing, and why the assignment to its undercapitalized U.S. shell company was ineffective. Paragraph 13 of the SAC describes how Opsys Limited approached plaintiff with a proposal to cancel the Lease and make a new lease, due to what Opsys Limited called its "corporate reality" that the entity occupying the premises was

1 now a wholly-owned subsidiary known as Opsys US, and how plaintiff declined this cancellation
2 request.

3 The SAC then describes how a proposed assignment was negotiated by Opsys
4 Limited *without disclosing* that Opsys Limited and Cambridge had already been moving toward
5 combining their businesses. The SAC details the representations that were made to plaintiff and
6 the failure of the conditions precedent to the effectiveness of the assignment within 90 days,
7 including:

8 (a) Sunnyside as Lessor and Opsys US, as assignee, were to execute an
9 Amendment No. 2 to Lease, which added several terms including an increased
10 security deposit, additional rent, a specific insurance policy, and additional warrants
11 for either \$50,000 to plaintiff or a warrant to purchase common stock. Amendment
12 No. 2 only became effective if the assignment became effective;

13 (b) Sunnyside was to receive a letter of credit for \$750,000;

14 (c) A pollution liability insurance policy subject to specific conditions
15 as set forth in the Lease was to be issued; and

16 (d) Sunnyside's attorney's fees were to be reimbursed.

17 Some or all of these conditions were not satisfied in the 90-day period. SAC at ¶¶ 15-21.³ Since
18 the conditions precedent were not satisfied within 90 days, the assignment was by its own terms at
19 ¶ 6 "automatically ☐ null and void and of no force or effect whatsoever."

20 ³ Defendants apparently seek to argue the merits and contend (again) that all of the
21 conditions precedent were established. The facts are at best ambiguous and defendants'
22 documents have not been produced. For instance, there is no known Amendment No. 2 to the
23 Lease signed by Opsys, whereas any amendment signed by plaintiff was either not delivered
24 during the 90-day period, or during that period became ineffective due to discovery of material
25 breaches of the lease and the assignment. The parties disagree as to whether Sunnyside received
26 the required letter of credit as there was subsequent negotiation, during the 90-day period when
27 breaches were discovered, as to how much cash the defendants should pay rather than pledge.
28 There is a disagreement as to whether the pollution liability policy that was to protect for business
interruption contained appropriate covenants. SAC at ¶ 17. Moreover, any partial satisfaction of
these conditions precedent cannot excuse the material nondisclosures and undisclosed breaches of
the lease, which fly in the face of the representations in the assignment itself that the Lease was in
full force and effect and that there were no breaches. SAC at ¶ 16. Obviously, the landlord would
not have permitted an assignment with knowledge that the lessee was violating federal and state
laws regarding hazardous materials or incurring large mechanics' liens or with knowledge that
support of the new tenant was highly risky given the British corporate transactions likely to make a
US research center expendable -- and immediately it was. It is against these facts -- alleged and
now subject to proof and discovery -- on which the defendants apparently continue to ask this
Court to dismiss the case at the pleading stage.

Equally as fatal to the assignment, within 90 days of signing and thus prior to its effectiveness, plaintiff learned of material breaches of the Lease that both preceded and followed the purported assignment. These breaches confer legal and equitable barriers to the purported assignment.

First, neither Opsys Limited as lessee, nor the short-lived tenant Opsys US, paid rent following the November 1, 2002 payment, mere weeks after the purported assignment was signed. Within the 90-day period, Opsys US was indeed selling its assets and preparing to file for bankruptcy. SAC at ¶¶ 19, 20.

Second, plaintiff learned that a substantial mechanics lien had been recorded against the premises in March 2002 and two more were recorded in December 2002, all three material breaches of the Lease and contrary to material representations made in the purported assignment itself. SAC at ¶ 19. Plaintiff was forced to settle and remove the liens and incurred costs and attorney's fees in doing so. The undisclosed mechanics' liens (Huber Decl., Exh. D) were a flat breach of the lease (SAC at ¶ 9; Huber Decl. Exh. D) and therefore a material breach of the assignment itself (SAC at ¶ 16).

Third, plaintiff discovered prior to effectiveness of the assignment, that Opsys Limited had allowed undisclosed accumulation of hazardous substances that resulted in contamination of the premises and prevented plaintiff from re-letting until the pollution was removed and clean-up was complete. Again, such conduct was inconsistent with the provisions of the purported assignment (Huber Decl., Exh. C; SAC ¶ 16) and negates its effect.

Thus, the SAC focuses the parties and the Court on the facts and legal issues central to this case.

2. The Basis for Successor Liability is Clearly Stated

The SAC alleges with specificity that Cambridge has completed its acquisition of Opsys Limited and is properly a defendant by succession. According to its January 5, 2005 Form 8-K filed with the SEC, Cambridge acquired Opsys Limited on December 29, 2004, 15 days after plaintiff originally filed this action. *See* Huber Decl., Exh. I, p. 2. As described above, there is

1 sufficient evidence that a transfer of interest has occurred. *Id.* Plaintiff should be allowed to
 2 allege successor-in-interest status as to Cambridge and conduct discovery against and receive
 3 discovery from Cambridge to prove this status.

4 B. Leave To Amend Should Be Liberally Granted

5 It is the policy of the federal courts to liberally grant leave to amend. *See* Fed. R.
 6 Civ. Proc. 15(a); *see also Foman v. Davis*, 371 U.S. 178, 182 (1962); *see also Lockman Found v.*
 7 *Evangelical Alliance Mission*, 930 F.2d 764, 772 (9th Cir. 1991); *Eminence Capital, LLC v.*
 8 *Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003). The Ninth Circuit has interpreted *Foman* as
 9 identifying "four factors relevant to whether a motion for leave to amend pleadings should be
 10 denied: undue delay, bad faith or dilatory motive, futility of amendment, and prejudice to the
 11 opposing party." *United States v. Webb*, 655 F.2d 977, 980 (9th Cir. 1981); *see also Poling v.*
 12 *Morgan*, 829 F.2d 882, 886 (9th Cir. 1987). The enumerated factors are not of equal weight, and
 13 delay alone is insufficient to deny leave to amend. *Id.* (citing *Howey v. United States*, 481 F.2d
 14 1187 (9th Cir. 1973). "Prejudice to the opposing party is the most important factor." *Jackson v.*
 15 *Bank of Hawaii*, 902 F.2d 1385, 1387 (9th Cir. 1990). The party opposing leave to amend bears
 16 the burden of showing prejudice. *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 187 (9th Cir.
 17 1987).

18 Here, none of the factors weigh against granting leave to file the SAC. First,
 19 plaintiff has new counsel subsequent to the Court's August 8, 2005 Order. Counsel promptly
 20 informed defendant and this Court of its intention to file an amended complaint. The litigation is
 21 still in its early stages; the parties did not exchange initial disclosures until September 19, 2005.
 22 Second, plaintiff's motive for filing the SAC cannot be described as dilatory or bad faith. Plaintiff
 23 seeks to amend in order to clarify the bases for liability and to add allegations of successor
 24 liability. This Court recognized the need for clarification of the pleadings during the Case
 25 Management Conference on October 3, 2005. Third, the amendment is not futile as it will inform
 26
 27
 28

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1 the parties and the Court of the specific breaches alleged and add a party that will be necessary for
2 any settlement or subsequent judgment obtained in this action.⁴

3 Finally, there is no prejudice to Opsys Limited or Cambridge in filing the SAC.
4 Opsys Limited did not file an Answer to the First Amended Complaint until September 12, 2005.
5 The underlying cause of action is the same and should not require a substantial change in the form
6 of Opsys Limited's Answer. Cambridge will be required to file a responsive pleading to respond
7 to the allegations of successor liability, but this is hardly prejudicial since Cambridge did not
8 complete its acquisition of Opsys Limited until after the filing of the Complaint in this action and
9 now holds the original defendant's assets that could have paid the rent and has maintained some of
10 that value in escrow pending resolution of its liability here. *See generally* Huber Decl., Exhs. I and
11 J.

12 Given the liberal policy, and the lack of any mitigating factors weighing against
13 amendment, plaintiff's request to file a Second Amended Complaint should be granted.

14 C. Rule 25(c) and General Principles of Successor Liability Apply to
15 Cambridge

16 Rule 25(c) of the Federal Rules allows a party to be joined with the original party to
17 an action when there has been "any transfer of interest." Here, Cambridge's SEC filings establish
18 that a transfer of interest occurred in part before and then completed after the filing of the initial
19 Complaint.

20 We acquired a 16% equity interest in CDT Oxford Limited in
21 October 2002. CDT Oxford carries out research in high efficiency P-
22 OLED materials and was 84% owned by Opsys Limited. In
23 December 2004 we acquired the remaining 84% of CDT Oxford. We
have had full management control over CDT Oxford since October
2002 and have been responsible for funding its operations since that
time.

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24 4 "Futility" under Rule 15(a) does not require establishing a *prima facie* case or
25 preponderance at the pleading stage through declarations or otherwise. An amendment is futile
26 only if "no set of facts can be proved under the amendment to the pleadings that would constitute a
27 valid and sufficient claim or defense." *Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir.
28 1988). Nonetheless, the materials attached to the Huber Declaration and the specific allegations in
the SAC certainly suffice to put the parties and the Court on notice that this is a substantially
meritorious action, which is now clearly laid out and directed at not only the hollowed out original
lessee but its successor-in-interest capable and by law required to pay the debts left behind.

Subsequent to the Company's original agreement with Opsys in October 2002, certain disputes arose with Opsys which were settled by a Settlement and Amendment Agreement, *pursuant to which the Company acquired 100% of the shares of Opsys Limited in December 2004* for the issue of 798 shares of its common stock.

Huber Decl., Exh. J at pp. 24 and F-16, (emphasis supplied). The 10-K also establishes that Cambridge is paying for the defense of *this* action through its own operating funds, and has held back a portion of the consideration paid to Opsys Limited to cover liability that Cambridge may have as a result of a judgment against Opsys Limited. Huber Decl. Exh. K, p. 8.⁵

While a corporate purchaser of assets for cash generally does not assume the seller's liabilities, the opposite is true where a de facto merger has occurred. *Marks v. Minnesota Mining and Manufacturing Co.*, 187 Cal.App.3d 1429, 1435 and fn. 13 (1987). "[W]here the consideration consists wholly of shares of the purchaser's stock which are promptly distributed to the seller's shareholders in conjunction with the seller's liquidation," liability for the predecessor's debts generally follows. *Id. quoting Shannon v. Samuel Langston Co.*, 379 F. Supp. 797, 807 (W.D. Mich. 1974). There are five relevant factors in establishing Cambridge's successor liability for the debts of Opsys Limited: "(1) was the consideration paid for the assets solely stock of the purchaser or its parent; (2) did the purchaser continue the same enterprise after the sale; (3) did the shareholders of the seller become the shareholders of the purchaser; (4) did the seller liquidate; and (5) did the buyer assume the liabilities necessary to carry on the business of the seller." *See Marks*, 187 Cal.App.3d at 1436 (citations omitted). Plaintiff has pled (SAC ¶ 26) and with public documents can establish a basis for, all of these elements here.

First, Cambridge completed its acquisition of Opsys Limited by issuing 797,695 shares of Cambridge par value stock and an additional 19,736 of Cambridge common stock to two

⁵ Proceeding without the transferee also impairs discovery, since Cambridge presumably has custody of information relevant to the alleged breaches of good faith and fair dealing by Opsys Limited in seeking to avoid the lease liability to Sunnyside in October 2002, coincident with the first step of the corporate transactions by which Cambridge took control of Opsys. The policy of Rule 25(c) is furthered by having before the Court the entity that has succeeded to this relevant information.

1 former Opsys Limited directors. Huber Decl., Exh. I at p. 2. This stock transfer satisfies the first
2 factor that the consideration paid was solely stock of the purchasing company.

3 The second factor, purchaser continuation of the business after sale is also evident
4 from the SEC filings. Cambridge's asset base is largely in-process research and development in
5 the area of fluorescent materials used in flat panel displays:

6 We are a recognized leader in OLED technology and believe we
7 have the most comprehensive portfolio of OLED IP in the areas of
8 P-OLED devices incorporating fluorescent materials, high efficiency
phosphorescent dendrimer and other materials, and solution
processing know-how.

9 Huber Decl. Exh. J at p. 4. The Opsys assets have flowed into Cambridge directly to support its
10 core research and development business:

11 In 2002, as part of our IP expansion strategy, we acquired control of
12 CDT Oxford Limited (formerly known as Opsys UK Limited),
13 which owns or controls a number of patents protecting the use of
14 dendrimers to make solution processable phosphorescent materials.
15 This allows us to develop proprietary materials which we believe
16 have the potential to form the basis of a future generation of high
17 efficiency green and red materials for solution-processed OLED
18 displays.

19 *Id.* at p. 8. Moreover, these acquired assets are not separately administered, as Cambridge has "had
20 full management control over CDT Oxford since October 2002 and have been responsible for
21 funding its operations." *Id.* at p. 24.

22 The third factor, did the shareholders of the seller become the shareholders of the
23 purchaser, is satisfied by the Settlement Agreement which describes how the shares will be
24 distributed to Opsys Limited's shareholders. *See generally* Huber Decl., Exh. G.

25 The fourth factor, did the seller liquidate, is also established by the SEC filings
26 quoted above that all of the assets of Opsys have been folded into Cambridge. The Final
27 Prospectus filed by Cambridge states that Opsys Limited has no operations other than its shares in
28 CDT Oxford Limited. Huber Decl., Exh H at p. 62.

The fifth and final factor, whether the buyer assumed the liabilities necessary to
carry on the business of the seller, is also met here. Cambridge expressly assumed the operational
liabilities of Opsys Limited. Huber Decl., Exh. F at schedule A & B.

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1 Cambridge has been selling its stock to the US public by openly saying that it took
2 over Opsys Limited and obtained its assets that complement Cambridge. It would be untrue and
3 inequitable to now hear that Cambridge interprets the corporate transactions as insulating itself
4 from liabilities of the acquired company. Justice requires this Court have jurisdiction over the
5 corporation that controls this litigation and is ultimately responsible for paying any judgment
6 obtained.

7 **V. CONCLUSION**

8 For the forgoing reasons, plaintiff requests that the Court grant plaintiff's request
9 for leave to file the Second Amended Complaint attached as Exhibit A to the Huber Declaration.

10 DATED: November 2, 2005

11 BARTKO, ZANKEL, TARRANT & MILLER
12 A Professional Corporation

13 By: *Alyson L. Huber*
14 Alyson L. Huber
15 Attorneys for Plaintiff
16 SUNNYSIDE DEVELOPMENT CO., LLC
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EXHIBIT H

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SUNNYSIDE DEVELOPMENT COMPANY, LLC, No. C 05-00553 MHP

Plaintiff,

v.

OPSYS LIMITED, a United Kingdom Company,

Defendant.

MEMORANDUM & ORDER
Re: Motion for Leave to File
Second Amended Complaint

Plaintiff Sunnyside Development Co. filed this lawsuit against defendant Opsys Limited, alleging that defendant breached a lease agreement for commercial property located in Fremont, California. Plaintiff's original complaint and First Amended Complaint also included a breach of contract claim against a related entity, Cambridge Display Technologies, Ltd. ("Cambridge Limited"), as well as fraud claims against both Opsys Limited and Cambridge Limited. This court dismissed the fraud claims against both parties and the contract claim against Cambridge Limited with prejudice. Now before the court is plaintiff's motion for leave to file a Second Amended Complaint ("SAC") which names another related entity, Cambridge Display Technology, Inc. ("Cambridge Inc.") as a defendant based on a theory of successor liability. Having considered the parties' arguments and submissions, and for the reasons set forth below, the court enters the following memorandum and order.

1 BACKGROUND¹

2 Plaintiff is the lessor of a commercial property located at 47375 Fremont Boulevard in
3 Fremont, California. On February 15, 2001 plaintiff agreed to lease commercial space at the
4 Fremont Boulevard property to defendant Opsys Limited, with the lease term running from May 1,
5 2001 through April 30, 2008. Pursuant to the conditions of the lease agreement, Opsys Limited
6 agreed to pay plaintiff a monthly base rent, to make certain capital improvements, and to conduct its
7 business in an environmentally safe manner.

8 Opsys Limited continued to make rental payments to plaintiff until October 2002. At that
9 time, Cambridge Limited acquired control of Opsys' British business, Opsys UK Limited ("Opsys
10 UK"). As part of the corporate reorganization accompanying that transaction, plaintiff, Opsys
11 Limited, and Opsys's United States subsidiary, Opsys US, signed a novation agreement that
12 purportedly assigned Opsys Limited's rights and obligations under the lease to Opsys US. Under the
13 terms of paragraph six of the novation agreement, the assignment was subject to a number of
14 conditions precedent.

15 Plaintiff received no rental payments after October 2002, and Opsys US was forced into
16 involuntary bankruptcy by four of its creditors in May 2003. On December 14, 2004, plaintiff filed
17 this action in the Superior Court for Alameda County, alleging breach of contract and fraud under
18 California law. That action was subsequently removed to this court, and on February 28, 2005
19 defendants moved to dismiss plaintiff's complaint pursuant to Federal Rule of Civil Procedure
20 12(b)(6), arguing that plaintiff had failed to state a claim under either of its legal theories. With
21 respect to plaintiff's breach of contract claims, defendants argued that Cambridge Limited was never
22 a party to the Fremont Boulevard lease and that Opsys Limited had been released from its
23 obligations under the lease agreement by the October 2002 novation agreement. As for plaintiff's
24 fraud claim, defendants argued that plaintiff had failed to plead the elements of fraud with
25 particularity, as is required by Federal Rule of Civil Procedure 9(b).

26 On April 22, 2005, the court issued an order granting defendants' motion in part and denying
27 it in part. Specifically, the court agreed with defendants that plaintiff's complaint failed to allege
28 that Cambridge Limited had ever been a party to the lease agreement, thus warranting dismissal of

1 the breach of contract claim against Cambridge Limited. The court also dismissed the fraud claims
2 against both defendants on the ground that plaintiff had failed to satisfy the pleadings requirements
3 of Rule 9(b). However, in considering the breach of contract claim against Opsys Limited, the court
4 rejected defendants' argument that the terms of the novation agreement warranted granting their
5 motion to dismiss. In particular, the court noted that defendants had failed to submit a signed copy
6 of the second amendment to the lease, and it could not be determined from the face of the pleadings
7 whether all of the conditions precedent to releasing Opsys Limited from liability for failure to
8 comply with the conditions of the lease had been fulfilled. Thus, drawing all reasonable inferences
9 in favor of the nonmoving party, the court held that plaintiff had stated a claim for breach of contract
10 against Opsys Limited.

11 On May 11, 2005 plaintiff filed a First Amended Complaint, having been granted leave to
12 correct the deficiencies that the court identified in its April 2005 order. In the First Amended
13 Complaint, plaintiff again alleged breach of contract and fraud against both defendants. The First
14 Amended Complaint added the allegation that Opsys Limited acted as the alter ego of Cambridge
15 Limited in entering into and breaching the lease agreement, thereby entitling plaintiff to recover
16 damages for breach of contract from Cambridge Limited as well as from Opsys Limited. Plaintiff
17 supplemented its fraud claims by identifying several of Opsys Limited's officers as the source of the
18 actionable misrepresentations that defendants allegedly made.

19 On May 31, 2005 defendants again moved for partial dismissal of the amended complaint,
20 arguing that plaintiff had again failed to state a claim for breach of contract against Cambridge
21 Limited or to plead adequately the required elements of fraud against either defendant. The court
22 again granted defendants' motion to dismiss the fraud claims, this time with prejudice, as the added
23 allegations in the First Amended Complaint did nothing to address the previously identified
24 shortcomings. In addition, the court dismissed the alter ego claim with prejudice based on a failure
25 to allege any of the requirements for alter ego liability.

26 Plaintiff has subsequently retained new counsel and now seeks leave to file a Second
27 Amended Complaint. The Second Amended Complaint differs from the First Amended Complaint
28 in two respects. First, plaintiff has supplemented the breach of contract allegations to enumerate the

1 specific ways in which defendant allegedly breached the lease and the reasons why the attempted
 2 novation is deficient. Second, plaintiff has attempted to join Cambridge Inc. as the successor in
 3 interest to Opsys Limited's business. Defendant objects to both proposed amendments, complaining
 4 that plaintiff is attempting to circumvent the court's previous dismissal with prejudice of the fraud
 5 claims and plaintiff's contract claim against Cambridge Limited.

6 7 LEGAL STANDARD

8 The Federal Rules of Civil Procedure provide that leave to amend be "freely given when
 9 justice so requires." Fed. R. Civ. Pro. 15(a). The Ninth Circuit has construed Rule 15(a) broadly,
 10 requiring that leave to amend be granted with "extraordinary liberality." Morongo Band of Mission
 11 Indians v. Rose, 893 F.2d 1074, 1079 (9th Cir. 1990); see also DCD Programs, Ltd. v. Leighton,
 12 833 F.2d 183, 186 (9th Cir. 1987) (Rule 15's policy of favoring amendments to pleadings should be
 13 applied with "extreme liberality"); Advanced Cardiovascular Sys., Inc. v. SciMed Life Sys., Inc.,
 14 989 F. Supp. 1237, 1241 (N.D. Cal. 1997) (Jensen, J.) ("[T]he court must be very liberal in granting
 15 leave to amend"); Poling v. Morgan, 829 F.2d 882, 886 (9th Cir. 1987) (describing a "strong policy
 16 permitting amendment").

17 Despite this liberal policy of amendment, leave will not be given where the district court has
 18 "a substantial reason to deny" the motion. J. W. Moore et al., Moore's Federal Practice § 15.14[1]
 19 (3d ed. 1998) ("district judge[s] should freely grant leave to amend when justice requires, absent a
 20 substantial reason to deny"). The court may decline to grant leave where there is "any apparent or
 21 declared reason" for doing so. Foman v. Davis, 371 U.S. 178, 182 (1962); see also Lockman Found.
v. Evangelical Alliance Mission, 930 F.2d 764, 772 (9th Cir. 1991).

22 The Ninth Circuit has interpreted Foman as identifying "four factors relevant to whether a
 23 motion for leave to amend pleadings should be denied: undue delay, bad faith or dilatory motive,
 24 futility of amendment, and prejudice to the opposing party." United States v. Webb, 655 F.2d 977,
 25 980 (9th Cir. 1981); see also Poling, 829 F.2d at 886. The enumerated factors are not of equal
 26 weight, and delay alone is insufficient reason to deny leave to amend. Webb, 655 F.2d at 980 (citing
 27 Howey v. United States, 481 F.2d 1187 (9th Cir. 1973)). By the same token, "[p]rejudice to the
 28

1 opposing party is the most important factor.” Jackson v. Bank of Hawaii, 902 F.2d 1385, 1387 (9th
2 Cir. 1990). Futility alone can also justify the denial of a motion to amend. Bonin v. Calderon, 59
3 F.3d 815, 845 (9th Cir. 1995), cert. denied, 516 U.S. 1051 (1996). The party opposing leave to
4 amend bears the burden of showing prejudice. DCD Programs, 833 F.2d at 187.

5
6 DISCUSSION

7 I. Additional Breach of Contract Allegations

8 Defendant argues that plaintiff’s proposed amendment is an attempt to reintroduce fraud
9 claims which this court has previously dismissed with prejudice. The parts of the proposed Second
10 Amended Complaint to which defendant objects most strenuously are paragraphs 15 and 16.
11 Paragraph 15 alleges that the novation was ineffective because “Opsys US was grossly
12 undercapitalized and the purported assignment without disclosure of material facts was in bad faith
13 under the Lease, and contrary to the covenant of good faith and fair dealing.” SAC ¶ 15. Paragraph
14 16 also alleges that the purported novation, which included a clause stating that “Opsys Limited was
15 in full compliance with all terms of the Lease,” was invalid due to “Opsys Limited’s ongoing
16 undisclosed activities in breach of the covenant of good faith and fair dealing.” Id. ¶ 16. Defendant
17 does not identify any particular prejudice flowing from the proposed amendment, other than its
18 supposed conflict with this court’s prior dismissal of the fraud claims. Plaintiff responds that a
19 claim of breach of the covenant of good faith and fair dealing is distinct from a claim of fraud.
20 Plaintiff also argues that the alleged breaches serve to undermine defendant’s defense based on
21 assignment of the contract.

22 The court finds that plaintiff’s proposed amendments are acceptable and add welcome clarity
23 to the sloppy complaint drafted by plaintiff’s former attorneys. The added allegations are distinct
24 from the previously dismissed fraud claim in a number of respects. First, plaintiff has not added a
25 separate claim for breach of the covenant of good faith and fair dealing, but rather has alleged that a
26 breach of the covenant rendered the purported assignment unenforceable. The fraud allegations, in
27 contrast, constituted an independent basis for recovery.
28

1 Second, the damages recoverable under a fraud claim are broader than those recoverable
2 under a claim for breach of contract or for breach of the covenant of good faith and fair dealing. See
3 generally Foley v. Interactive Data Corp., 47 Cal. 3d 654, 684 (1988) (holding that, outside of
4 limited contexts such as insurance contracts, a party may not recover tort damages for breach of the
5 covenant of good faith and fair dealing).

6 Third, in order to prove a breach of the covenant of good faith and fair dealing, plaintiff need
7 not prove scienter. "Nor is it necessary that the party's conduct be dishonest. Dishonesty
8 presupposes subjective immorality; the covenant of good faith can be breached for objectively
9 unreasonable conduct, regardless of the actor's motive." Carma Developers (Cal.), Inc. v. Marathon
10 Development California, Inc., 2 Cal. 4th 342, 373 (1992). This distinction is particularly relevant in
11 light of the reason for the court's dismissal of the fraud claims: plaintiff's failure to state facts
12 supporting a finding of scienter. See Sunnyside Dev. Co. v. Opsys Ltd., No. C 05-00553 MHP, slip
13 op. at 8-9 (N.D. Cal. Aug. 8, 2005).

14 Defendant also alleges that plaintiff is using the proposed amendment to advance an entirely
15 new breach of contract theory, in response to the production of a signed copy of the second
16 amendment to the lease—the document which allegedly consummated the novation. Previously, the
17 court found that the absence of a signed copy supported plaintiff's claim that the novation was
18 invalid. See Sunnyside Dev. Co. v. Opsys Ltd., No. C 05-00553 MHP, slip op. at 3-4 (N.D. Cal.
19 Apr. 22, 2005). While the court acknowledges that the production of a signed copy appears to
20 weaken plaintiff's case, plaintiff has alleged additional violations of the terms of the assignment. In
21 any event, even if plaintiff's current complaint articulates a theory that conflicts with plaintiff's
22 earlier claims, there is no requirement of absolute consistency in pleadings, particularly in the early
23 stages of a case. Fed. R. Civ. P. 8(e)(2) ("A party may also state as many separate claims or
24 defenses as the party has regardless of consistency and whether based on legal, equitable, or
25 maritime grounds"); see also Coleman v. Standard Life Ins. Co., 288 F. Supp. 2d 1116, 1119 (E.D.
26 Cal. 2003).

27 For all of the foregoing reasons, and in furtherance of the rule providing for liberal
28 amendment of complaints, the court grants plaintiff's motion to file the amended breach of contract

1 claims.

2
3 II. Successor Liability of Cambridge Inc.

4 Defendant challenges plaintiff's attempt to add Cambridge Inc. on a number of grounds.
5 First, defendant claims that Cambridge Inc. is the same party that was dismissed from the action
6 with prejudice in connection with defendant's motion to dismiss plaintiff's First Amended
7 Complaint. Second, defendant claims that Cambridge Inc. is not a successor in interest, but rather is
8 a stockholder of Opsys Limited. Plaintiff responds that Cambridge Inc. is a different corporate
9 entity from Cambridge Limited, the party previously dismissed. Plaintiff also argues that, regardless
10 of the form of ownership, Cambridge Inc. has entered into a *de facto* merger with Opsys Limited.


11 The court need not engage in the merits of either party's arguments at this time because
12 joinder of Cambridge Inc. is premature. As an alleged successor in interest, Cambridge Inc. will
13 only be involved in this lawsuit to the extent that plaintiff is unable to collect a judgment from Opsys
14 Limited. It would therefore be inefficient to join Cambridge Inc. at this time. Plaintiff's motion for
15 leave to add Cambridge Inc. as a party is therefore denied without prejudice, subject to renewal if
16 and when the primary liability of Opsys Limited is established.

17 CONCLUSION

18 For the above reasons the court hereby GRANTS IN PART and DENIES IN PART
19 plaintiff's motion for leave to file its Second Amended Complaint.

20
21 IT IS SO ORDERED.

22
23
24 Date: January 3, 2006

25
26 
27 MARILYN HALL PATEL
28 United States District Judge
Northern District of California

United States District Court
For the Northern District of California

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ENDNOTES

1. Unless otherwise noted, background facts are taken from plaintiff's proposed Second Amended Complaint.

Exhibits I-N to Request for Judicial Notice

EXHIBIT I



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October 26, 2006

Justin M. Lichterman
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jLichterman@orrick.com

The Hon. Judge Marilyn Hall Patel
Courtroom 15, 18th Floor
United States District Court
450 Golden Gate Ave
San Francisco, CA 94102

Re: Sunnyside Development Co. LLC v. Opsys Limited, Case No. 05-00553

Dear Judge Patel:

Defendant Opsys Limited ("Opsys") submits this Discovery Statement pursuant to the Court's Order of September 14, 2006.

1. **Opsys's redaction of documents OPS 01712 and OPS 01408.** Plaintiff contests redactions to Opsys Board Meeting minutes dated April 24, 2003, and an October 3, 2002 email. Plaintiff argues that the communication in the Board minutes, reflecting legal advice of Craig Prim at the Murray & Murray law firm, is not privileged because Opsys did not retain Murray & Murray. However, the attorney-client privilege applies even if the attorney has not actually been retained. *See* Cal. Evid. Code § 951; *People v. Navarro*, 138 Cal. App. 4th 146, 157 (2006). The context of the document shows that Opsys asked a question about its legal obligations with respect to treatment of certain creditors, and the redaction contains legal advice in response. Moreover, the advice is protected by the common interest privilege because Opsys and Opsys US had an identical interest in assessing their risk of liability based on the treatment of an Opsys US creditor. *Hewlett Packard Co. v. Bausch & Lomb, Inc.*, 115 F.R.D. 308, 309 (N.D. Cal. 1987).

In the email, Mr. Rhea tells Messrs. Holmes and Zervoglos about legal advice provided by Wilson Sonsini. The parties do not dispute that (1) Wilson Sonsini represented Opsys US; (2) Mr. Rhea was a consultant to Opsys US; and (3) Messrs. Holmes and Zervoglos were Opsys US Directors. Accordingly, the redaction is proper. *See* Cal. Evid. Code §§ 951, 952.

2. **Attorney invoices.** Plaintiff claims damages in the form of attorneys fees for various legal services, and has produced some redacted attorney invoices. Opsys therefore is entitled to review the invoices without redaction because their substance is "in issue". *See Eisendrath v. Superior Court*, 109 Cal. App. 4th 351, 363 (2003).

3. **The transaction between Opsys and Cambridge Display Technology ("CDT").** Plaintiff claims it is entitled to all documents concerning a transaction between Opsys and CDT so that Plaintiff knows what it was not told about the deal. But this is not a deal case; it is a breach of contract action. Plaintiff's request goes far beyond issues pertaining to a breach of lease. Plaintiff



O R R I C K

Judge Marilyn Hall Patel
October 26, 2006
Page 2

tries to justify its request on the theory that Opsys breached the implied covenant of good faith and fair dealing by not telling Plaintiff everything about the deal in advance. Opsys agreed to produce and has produced documents concerning the transaction that mention both CDT and Opsys and refer or relate to Plaintiff or the lease, between June 1, 2002 and December 31, 2002. Thus, Opsys produced documents with a nexus to this case under Plaintiff's theory of relevance.

4. **Plaintiff's deficient expert reports.** The parties' Expert Disclosure deadline was September 22, 2006. On that date, Plaintiff disclosed two experts, Paul Ainslie and Kenneth Conner, but did not produce a report or disclose any opinions or their bases as required by Federal Rule of Civil Procedure 26(a)(2)(B). Mr. Conner previously testified in this case as a percipient witness. Accordingly, his opinions about subject matters not covered in his deposition should be prohibited. On October 23, 2006, Opsys received Plaintiff's supplemental and rebuttal expert disclosure, which provided a one-page statement of opinion and a damages spreadsheet from Mr. Ainslie, but no other detail. Plaintiff's noncompliant and untimely disclosures should result in the exclusion of any testimony from Mr. Ainslie.

Finally, Plaintiff yesterday raised an issue with Opsys's rebuttal expert disclosures, which were timely made on October 20, 2006 in an effort to comply with the Scheduling Order. At that time, Opsys did not know the opinions of Plaintiff's experts, and so could not provide complete disclosures. Opsys will supplement its rebuttal disclosure on a schedule set by the Court, if required.

Sincerely,

Justin M. Lichterman

cc: Alyson Huber, Esq.

EXHIBIT J

COPY

BARTKOZANKEL

Bartko • Zankel • Tarrant • Miller | Lovitt & Hanftan, Inc. of Counsel

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October 26, 2006

VIA HAND DELIVERY

RECEIVED

OCT 26 2006

Hon. Marilyn H. Patel
United States District Court, Northern District of California
450 Golden Gate Ave, Courtroom 15, 18th Floor
San Francisco, CA 94102

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Re: Sunnyside Development Company LLC v. Opsys Limited, et al.;
Case No. C 05-00553 MHP (Cal.N.D.)-- Discovery Disputes

Dear Judge Patel:

Plaintiff Sunnyside Development Company LLC ("Sunnyside") hereby submits this summary description of the discovery disputes between Sunnyside and Opsys Limited ("Opsys") before the telephonic hearing set for **11:00 a.m. on October 27, 2006:**

1. Cambridge Display Technologies' ("CDT") relevance. Opsys has refused to provide all documents between CDT and Opsys between June 1, 2002 and December 31, 2002. See RFPD Nos. 7 and 13. Opsys only agreed to provide documents that refer to Sunnyside or the Lease, impacting Sunnyside's ability to defend against Opsys' affirmative defenses that Opsys had no value. The withheld documents likely refer to value and how other Opsys creditors were given better deals than Sunnyside. Opsys expert disclosure states that it will present evidence on "negotiations, structure and terms of the CDT-Opsys Limited transaction," but it refuses to provide discovery covering this same topic.

2. Community of Interest Privilege. Opsys has asserted a privilege over all communications concerning the advice of attorneys between Opsys and Opsys US during the purported lease assignment although the two entities were supposedly in an arms length transaction shifting a \$7 million liability and had separate counsel. The interests were adverse and the disclosure of the advice of attorneys was a waiver of the privilege and those documents should be produced.

3. Sunnyside August 2006 production. Opsys is seeking to preclude the use of documents received in August 2006, prior to the discovery cut-off on the grounds that they were not produced earlier. There is no prejudice and this is the appropriate time to address preclusion rather than at trial in February. Mostly, the documents are checks and expense information and are not controversial.

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Hon. Marilyn H. Patel
October 26, 2006
Page 2

4. Ainslie report. Opsys is seeking to preclude the testimony of Paul Ainslie, Sunnyside's damages expert on the grounds that his full opinion was not received on the initial disclosure date. Mr. Ainslie supplemented and provided a rebuttal report on October 20, 2006. Mr. Ainslie's report required reviewing documents received after the discovery cut-off in September and October and was unable to commit to a final damages number until October 20, 2006. His supplemental report reduced Sunnyside's earlier damages estimate by \$3 million, and he is ready to be deposed, evidencing the lack of prejudice to Opsys from any delay.

Very truly yours,

Bartko•Zankel•Tarrant•Miller
A Professional Corporation



Alyson L. Huber

cc: All Counsel

RJN 101

EXHIBIT K

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT of CALIFORNIA

CIVIL PRETRIAL MINUTES

Date: October 27, 2006

Case No: C 05-0553 MHP

Judge: MARILYN HALL PATEL

Case Title: SUNNYSIDE DEVELOPMENT COMPANY LLC. v. OPSYS LTD., ET AL.

Appearances:

For Plaintiff : Robert Bunzel, Alison Huber (all appearing by telephone)

For Defendant: James Burns, Justin Lichterman (all appearing by telephone)

Deputy Clerks: Edward Butler

Court Reporter: Catherine Edwards

Time in Court: 11:03 a.m. - 11:55 a.m.

PROCEEDINGS

1. Telephonic Discovery Hearing, re: letter briefs submitted by Plaintiff and Defendants, 10/26/06, pursuant to court's Order of 9/14/06.

SUMMARY

1. Defense must submit to the court for in-camera review the Opsys Board Meeting Minutes dated 4/24/03 and the 10/3/02 e-mail, within 10 days of today's date, i.e. Monday, 11/6/06.
2. With respect to ¶ 1 of the Plaintiff's letter brief, re: CDT documents, Defendants shall provide the documents within 10 days of today's date, i.e. Monday, 11/6/06.
3. With respect to ¶¶ 3 and 4 of the Plaintiff's letter brief, any and all expert reports and supplemental reports shall be finished by 11/15/06. Any depositions and further discovery regarding the reports shall be accomplished by 12/15/06.
4. Plaintiff is to provide all Redacted Attorney Invoices within 10 days of today's date, i.e. Monday, 11/6/06.

EXHIBIT L

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

SUNNYSIDE DEVELOPMENT COMPANY,)
LLC,)

No. C 05-00553 MHP

Plaintiff,

VERDICT FORM

v.

OPSYS LIMITED, a United Kingdom
Company,

Defendant.

RJN 103

VERDICT FORM

We answer the questions submitted to us as follows:

1. Did Opsys Limited make material representations and warranties in the Assignment of Lease and Consent of Lessor ("Assignment") that were inaccurate?

a. At the time of entering into the Assignment?

 Yes X No

b. At the time of the effective date of the Assignment?

X Yes No

Regardless of how you answer question 1, answer question 2.

2. Did the Assignment effectively transfer the Lease from Opsys Limited to Opsys U.S. Corporation?

 Yes X No

If your answer to this question is Yes, stop here and have the presiding juror sign and date this form. If your answer is No, then answer question 3.

3. Did Opsys Limited breach the Lease with Sunnyside?

X Yes No

If your answer to this question is No, stop here and have the presiding juror sign and date this form. If your answer is Yes, then answer question 4.

4. Did Opsys Limited's breach cause Sunnyside to suffer damages?

X Yes No

If your answer to question 4 is No, stop here and have the presiding juror sign and date this form. If your answer to question 4 is Yes, then answer question 5.

5. What are Sunnyside's damages after reducing for any mitigation that you find?

TOTAL \$ 4,853,017

Signed: MARGARET RUEFA-WISS
Presiding Juror

Dated: 9 MARCH '07

After the verdict form has been signed, deliver this verdict form to the clerk.

EXHIBIT M

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Attorneys for Plaintiff
 SUNNYSIDE DEVELOPMENT CO., LLC

UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA

SUNNYSIDE DEVELOPMENT COMPANY,)
 LLC,)

Plaintiff,)

v.)

OPSYS LIMITED, a United Kingdom)
 Company,)

Defendants.)

No. C 05-00553 MHP

**PLAINTIFF'S NOTICE OF MOTION,
 AND MOTION FOR ATTORNEY'S
 FEES PURSUANT TO THE PARTIES
 CONTRACTS AND MOTION TO
 ADD CAMBRIDGE DISPLAY
 TECHNOLOGY, INC. AS A PARTY
 TO ACTION AND JUDGMENT**

Hearing Date: May 16, 2007
 Time: 1:00 p.m.
 Dept: 15
 Judge: Hon. Marilyn H. Patel

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RJN 105

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RJN 107

TABLE OF AUTHORITIES**CASES**

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24	section 1032	5
25	section 187	16
26	section 1033.5	5
27	California Corporations Code	
28	section 1107(a)	12

1 Delaware General Corporation Law

2 section 259..... 12

3

4

OTHER AUTHORITIES

5 9 Witkin, Summary of Cal. Law, "Corporations" 16

6 Rest. 2d of Judgments (1982)..... 13

7 Wright and Miller, Federal Practice & Procedure (2007) 14

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1 **NOTICE OF MOTIONS AND MOTIONS**

2 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

3 PLEASE TAKE NOTICE that on May 16, 2007 at 1:00 p.m. or as soon thereafter
4 as the matter may be heard before the Honorable Marilyn Hall Patel, United States District Judge,
5 in Courtroom 15 of the above entitled Court, plaintiff Sunnyside Development Co., LLC
6 ("Sunnyside" or "plaintiff") will and hereby does move for an award of its reasonable attorney's
7 fees, costs and expenses in the amount of \$936,534.83 pursuant to the parties' contracts.

8 Plaintiff will also and hereby does move to add Cambridge Display Technologies,
9 Inc. ("Cambridge") as a party to the action and judgment as Opsys Limited's successor pursuant to
10 general principles of successor liability, and pursuant to Federal Rules of Civil Procedure,
11 Rules 25(c) and 69(a).

12 Alternatively, Sunnyside seeks leave to add a claim for fraudulent conveyance of
13 the assets of Opsys Limited to Cambridge and to CDT Oxford Limited, pursuant to Rule 18(b).

14 These motions will be based on this Notice of Motion and Motion, the
15 Memorandum of Points and Authorities, the accompanying Declarations of Alyson L. Huber,
16 Robert H. Bunzel and Paul Ainslie and the complete files and records herein, and on the argument
17 and other evidence to be presented at the hearing of this matter.

18 DATED: April 2, 2007

19 BARTKO, ZANKEL, TARRANT & MILLER
20 A Professional Corporation

21 By: 

22 Robert H. Bunzel
23 Attorneys for Plaintiff

24 SUNNYSIDE DEVELOPMENT CO., LLC

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26
27 RJN 113

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Sunnyside seeks an award of \$936,534.83 for its attorney's fees, costs and expenses reasonably incurred in litigating this breach of contract case to judgment. Although plaintiff attempted to keep costs down by limiting depositions and motion practice, the defense mounted an aggressive campaign to challenge every pleading, take the deposition of virtually every person ever associated with the plaintiff and made a Motion for Summary Judgment on virtually every legal and factual issue raised at trial. In this climate, it is not unreasonable for plaintiff to incur fees and costs that equal only 19% of the verdict received in prosecuting its claim and defending against Opsys Limited's affirmative defenses.

Sunnyside also requests that the Court add Cambridge as a party to the action and judgment against Opsys Limited. Alternatively, prompt discovery and an evidentiary hearing pursuant to Rules 69(a) and 25(c) should be ordered with leave to file a fraudulent conveyance claim if needed.

II. PLAINTIFF'S MOTION FOR ATTORNEY'S FEES AND COSTS

A. Relevant History For the Award of Attorney's Fees.

On February 15, 2001, Sunnyside and Opsys Limited entered into a Lease that provides for the recovery of attorney's fees. Paragraph 31 of the Lease states:

If any Party of Broker brings an action or proceeding involving the Premises to enforce the terms hereof or to declare rights hereunder, the Prevailing Party (as hereafter defined) in any such proceeding, action, or appeal thereon, shall be entitled to reasonable attorney's fees. Such fees may be awarded in the same suit or recovered in a separate suit, whether or not such action or proceeding is pursued to decision or judgment. The term, "**Prevailing Party**" shall include, without limitation, a Party or Broker who **substantially obtains** or **defeats the relief sought**, as the case may be, whether by compromise, settlement, judgment, or the abandonment by the other Party or Broker of its claim or defense. The attorney's fees award shall not be computed in accordance with any court's fee schedule, but shall be such as to fully reimburse all attorney's fees reasonably incurred. In addition, Lessor shall be entitled to attorney's fees, costs and expenses incurred in the preparation and services of notices of Default and consultations in connection therewith, whether or not a legal action is subsequently commenced in connection with such Default or resulting Breach.

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1 Declaration of Alyson L. Huber ("Huber Decl."), Exh. 1 (Exhibit 2 at trial) (emphasis in original
 2 and supplied). On or about October 2002, Sunnyside and Opsys Limited entered into another
 3 contract, the Assignment of Lease and Consent of Lessor ("Assignment"), which also provides for
 4 attorney's fees, costs and expenses. Huber Decl. Exh. 2 (Exhibit 31 at trial). Paragraph 8(f) of the
 5 Assignment provides:

6 In the event an action is initiated to interpret or enforce any of the
 7 terms of this Assignment or enforce any judgment, the prevailing
 8 party shall be entitled to receive from the other party reasonable
 9 attorney's fees, costs, and expenses incurred in the action.

10 On December 14, 2004, Sunnyside filed this breach of contract case. Sunnyside
 11 proceeded to trial on only a single claim for breach of the lease (although plaintiff sought damages
 12 for multiple breaches). The primary defense asserted by Opsys Limited was that the Assignment
 13 effectively relieved it from any liability under the Lease, arguing that the Lease was transferred to
 14 another entity. The instructions read to the jury focused on plaintiff's breach of contract claim and
 15 Opsys Limited's attempts to enforce the Assignment, which would have been a written novation.
 16 All of the underlying disputed facts for both plaintiff's claims and each of defendant's affirmative
 17 defenses were related. Opsys Limited relied on the Assignment and Sunnyside the Lease.

18 On March 9, 2007, the jury returned a verdict in favor of plaintiff on its breach of
 19 contract claim in the amount of \$4,853,017. Huber Decl. Exh. 3. The jury found that the
 20 Assignment did not effectively transfer the Lease. *Id.*

21 B. Sunnyside is Entitled to Its Full Attorney's Fees, Costs and
 22 Expenses Reasonably Incurred Under the Lease and the Assignment

23 1. State Law Governing The Parties Contracts Controls
 24 And Supports An Award To Sunnyside Of Fees,
 25 Costs And Expenses.

26 Sunnyside files this motion for an award of attorney's fees pursuant to Federal
 27 Rules of Civil Procedure, Rule 54(d)(2) and Local Rule 54-6.¹ Sunnyside is entitled to be fully
 28 reimbursed for its attorney's fees, costs and expenses reasonably incurred under two separate

¹ Sunnyside has concurrently filed a separate Bill of Costs pursuant to 28 U.S.C. § 1920, Federal Rules of Civil Procedure, Rule 54(d)(1) and Local Rule 54-1 for the costs taxable by the Clerk. Sunnyside requests that any costs not taxed by the Clerk be added to the award issued under this Motion for Attorney's Fees.

1 contracts, the Lease and the Assignment. See Huber Decl. Exh. 1 at ¶ 31 and Exh. 2 at ¶ 8(f).
 2 State law governs the construction of a contract for recovery of attorney's fees and the
 3 reasonableness of fees. See *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 259
 4 fn.31 (1975). Here, California law provides that the measure and mode of compensation of
 5 attorney's fees is left to the express or implied agreement of the parties. Cal. Civ. Code § 1021.
 6 When a party is entitled to attorney's fees from an express contractual right, the Court does not
 7 apply a lodestar analysis since the award is based on the parties' agreement and not on equitable
 8 determinations of the Court. *Hsu v. Abbata*, 9 Cal.4th 863, 876-77 (1995).

9 Sunnyside is also entitled to its attorney's fees, costs and expenses in litigating
 10 against the affirmative defense of the written Assignment. In California, when one party is
 11 successful in defeating a contract claim (here the effectiveness of the Assignment) by proving that
 12 the contract was not enforceable, that party is entitled to its attorney's fees pursuant to California
 13 Civil Code § 1717. Civil Code § 1717 was enacted to make one-sided attorney's fees provisions
 14 apply to all parties to the contract and to prevent the oppressive use of one-sided attorney's fees
 15 provisions. *Reynolds Metals Co. v. Alperson*, 25 Cal.3d 124, 128 (1979). To achieve this purpose
 16 the statute applies in favor of the prevailing party on a contract claim (here, the Assignment),
 17 whenever that party would have been liable under the contract for attorney's fees had the other
 18 party prevailed. *Hsu, supra*, 9 Cal.4th at 870. Had Opsys Limited successfully enforced the
 19 Assignment, Opsys Limited would have claimed that Sunnyside is liable for attorney's fees
 20 pursuant to ¶ 8(f) of the Assignment. Since Sunnyside prevailed, Sunnyside is entitled to the
 21 benefit of ¶ 8(f), pursuant to § 1717.

22 The Assignment's fee provisions are as broad or broader than the Lease provision,
 23 and extend to "attorney's fees, costs, and expenses" and efforts to "enforce any judgment." Huber
 24 Decl. Exh. 2 at ¶ 8(f). Had Opsys Limited prevailed, it would have been entitled to fees to enforce
 25 any judgment. Under Civil Code § 1717, and the California Supreme Court's interpretation of its
 26 underlying policy, Sunnyside cannot receive less of a benefit than Opsys Limited would have
 27 received had it prevailed on the Assignment. *Hsu, supra*, 9 Cal.4th at 870-71. Contracting parties

are free to agree to choose a broader standard authorizing recovery of reasonable litigation costs and expenses, and the court must award these costs and expenses to the prevailing party. *Texas Commerce Bank v. Garamendi*, 28 Cal.App.4th 1234 (1994); *Arntz Contracting Co. v. St. Paul Fire & Marine Inc. Co.*, 47 Cal.App.4th 464, 491 (1996).

2. Sunnyside Is the Prevailing Party And Should Be Awarded Its Reasonable Attorney's Fees.

According to the Lease: "'Prevailing Party' shall include, without limitation, a Party or Broker who substantially obtains or defeats the relief sought."² Huber Decl. Exh. 1 at ¶ 31. Plaintiff is easily the prevailing party on the Lease and the Assignment contract. The Defendant asserted an affirmative defense that the Assignment created a novation and released it from liability under the Lease. Plaintiff defeated this claim in its entirety and is entitled to its reasonable attorney's fees, costs and expenses incurred in defeating this and all other affirmative defenses. Huber Decl. Exh. 1 at ¶ 31 and Exh. 2 at ¶ 8(f).

Plaintiff also substantially obtained the damages it sought on its breach of contract claim. Plaintiff requested that the jury award approximately \$6.6 million in damages. Defendant argued that it owed zero under the Lease but that even if it were found liable under the Lease reasonable damages, taking into account asserted mitigation, would fall between \$1-1.5 million. Huber Decl. ¶ 4. The jury awarded close to \$4.9 million in damages to the plaintiff. Huber Decl. Exh. 3. Plaintiff clearly is the prevailing party.

3. Sunnyside's Attorney's Fees Were Reasonably Incurred.

Sunnyside has elected to have its attorney's fees related to this litigation determined by the Court as costs to be taxed to the judgment. *See Beneficial Standard Properties, Inc. v. Sharps*, 67 Cal.App.3d 227, 231-232 (1977); Civ. Code § 1033.5 (a)(10)(A); also discussed at Court Discovery Hearing on October 27, 2006. Sunnyside is not seeking by this post-trial motion any attorney's fees, costs or expenses that were presented to the jury as damages. For example,

² Prevailing Party is also defined in Cal. Code of Civ. Proc. § 1032(a)(4) as the party with a net monetary recovery. Civ. Code § 1717(b)(1) states "the party prevailing on the contract shall be the party who recovered a greater relief in the action on the contract." Plaintiff meets both of these definitions as well as the definition in the contract.

Sunnyside presented evidence at trial that it incurred attorney's fees for services performed by the law firm of Wendel Rosen related to the clean-up of the property and the bankruptcy of Opsys US Corporation. Sunnyside is not seeking those attorney's fees in this motion. Rather, Sunnyside is only requesting an award of attorney's fees for those fees, costs and expenses directly related to the prosecution of this action. Those fees include the services of Stanley Hilton, Esq., the Bartko firm, and all experts and consultants used for this case.

The Lease provides that the award of attorney's fees to the prevailing party shall be such as to "fully reimburse" it for all attorney's fees reasonably incurred. All fees and costs prayed for here were incurred by Sunnyside. Bunzel Decl., ¶ 22. It is within the sound discretion of the Court to determine whether the full fees were reasonably incurred. *Fed-Mart Corp. v. Pell Enterprises, Inc.*, 111 Cal.App.3d 215, 228 (4th Dist. 1980). There are several factors that contributed to the amount of fees incurred in this action. Plaintiff has summarized its time spent on categories and tasks to shed light on why this breach of contract case was so heavily litigated. Huber Decl. ¶¶ 8-9. To assist the Court in determining the reasonableness of the fees and costs, plaintiff presents the following breakdown. See Huber Decl. ¶ 8.

<u>Category</u>	<u>Description</u>	<u>Hours</u>	<u>Fees</u>
1	Initial Case Analysis	264.65	\$71,137.50
2	Efforts to Add CDT, Inc.	55.8	\$20,060.50
3	Document management	106	\$16,527.00
4	Fact Discovery	529.4	\$146,777.50
5	Communications w/ client	19.9	\$8,821.25
6	Expert Discovery	152.15	\$44,925.00
7	Defendant's MSJ	321.2	\$90,966.00
8	Sale of Property issues	2.05	\$1,025.00
9	Trial preparation	766.35	\$214,299.00
10	Trial	465.05	\$136,227.50
11	Post-Verdict	13.85	\$5,205.00
12	Fee Application	35.65	\$8,787.50
13	Mediation & Settlement	46.95	<u>\$18,541.25</u>
	Bartko Fees Total	2770	\$783,300.00
14	Estimate 3/24-5/16	100	\$39,000.00
15	Stanley Hilton, Esq. Fees		\$6,200.00
16	Non-taxable costs		<u>\$108,034.83</u>
	TOTAL Award Requested		\$936,534.83

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4. Plaintiff's Fees Should Not Be Reduced.

Since all of the claims that were taken to trial are claims for which there is a right to attorney's fees (Lease and Assignment), there is no reason to apportion the attorney's fees among claims. *Reynolds*, 25 Cal.3d at 129. Even if the Court concluded that other claims were not technically contract claims, the rule in California is that attorney's fees need not be apportioned when incurred for representation on an issue "common" to both a cause of action in which fees are proper and one in which they are not allowed. *Korech v. Hornwood*, 58 Cal.App.4th 1412, 1416, 1422 (2nd Dist. 1997), citing *Reynolds*, 25 Cal.3d at 129-130. For example, the initial pleading of fraud in the inducement of the Lease arises from the same nucleus of facts and relates to the Lease, and should not be subject to apportionment. Even if the Court thought otherwise, plaintiff's attorney's fees for Stanley Hilton, Esq. for \$6,200 would only be slightly reduced. Huber Decl. ¶ 8 (15). Plaintiff's present lawyers never argued a claim that fell outside the breach of contract claim for relief.

a. No Apportioning for Defendant's Alleged Success on Mitigation.

Opsys Limited on March 14, 2007, argued at the post-trial case management conference that it should be deemed the prevailing party on the "issue" of "mitigation," implying that fees should be apportioned accordingly. The Court should reject this argument. First, neither the Lease nor the Assignment provides for this reduction. The term "prevailing party" is expressly defined by contract to mean the party that "substantially obtains" the relief sought. There is no question that Sunnyside substantially obtained a significant breach of contract award.

Second, there is no California authority supporting the proposition that a Court should apportion fees in the context of a contract-based attorney's fees award among sub-claims within a breach of contract claim for relief. To do so would be contrary to the parties' binding agreement.

Third, Opsys Limited's closing argument on mitigation establishes that Opsys Limited was not successful. Huber Decl. ¶ 4. Mr. Burns asked the jury to only award between \$1 million-\$1.5 million in damages after mitigation. Mr. Burns stated that Sunnyside only had

1 \$638,000 in lost rent through June 2004 and should only receive an additional nine months of rent,
 2 or \$954,000, for a total loss of \$1,580,000. Mr. Burns claimed that anything additionally sought
 3 by Sunnyside was "over reaching." Sunnyside requested an award of \$6.6 million in its closing
 4 argument and the jury returned a verdict for plaintiff in the amount of \$4,853,017. These facts do
 5 not imply that Opsys Limited was more successful than Sunnyside regarding the duty to mitigate,
 6 and there were other damage-reducing theories advanced by the defense (such as penalty plus
 7 interest being excessive), as well as an overall "reasonableness" instruction.

8 b. No Apportioning of Attorney's Fees for
 9 Attempts to Add Cambridge as a Party or for
¶ 12.1 of the Lease.

10 Plaintiff has sought to add Cambridge Display Technology, Inc. as a successor
 11 party in aid of enforcement of the judgment, a clearly recoverable expense under the Assignment
 12 at ¶ 8(f) and Lease at ¶ 31. In addition, plaintiff had earlier asserted breach of ¶ 12.1 of the Lease,
 13 which provided additional breach of contract damages (unconsented assignment). Ainslie Decl.
 14 ¶ 2. Though plaintiff dropped this claim in order to avoid confusing the jury, it was integrally
 15 related to the breach of contract claim. The prevailing party is entitled to be fully reimbursed for
 16 its attorney's fees even if one of five asserted breaches on which related fees and cost were spent,
 17 was not presented to the jury. As long as plaintiff "substantially obtained" the relief it sought, it is
 18 the prevailing party under the contracts and is entitled to its reasonably incurred fees expenses. As
 19 the U.S. Supreme Court noted in *Hensley v. Eckerheart*, 461 U.S. 424, 431 (1983), even in the
 20 absence of a contractual basis for fee recovery, no reduction is warranted where "plaintiff's
 21 counsel expended a certain limited amount of time pursuing certain issues of fact and law that
 22 ultimately did not become litigated issues in the case or upon which plaintiffs ultimately did not
 23 prevail," where "plaintiffs prevailed on the merits and achieved excellent results."

24 Finally, the fees incurred on this motion are recoverable. *Bruckman v. Parliament*
 25 *Escrow Corp.*, 190 Cal.App.3d 1051, 1062 [recovery of fees for fee-related activity authorized in
 26 contract action].

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III. PLAINTIFF'S MOTION TO ADD CAMBRIDGE AS A PARTY TO ACTION AND JUDGMENT

A. Factual Background.

Sunnyside seeks post-verdict relief so that the company that has succeeded to the assets and business of the defendant, and which litigated this case on its behalf, shall pay this Court's judgment.³ This motion is supported by a large volume of publicly-filed documents and undisputed exhibits, and relates the following basic facts:

- In fall 2002, judgment debtor Opsys Limited had debts in excess of 17 million British pounds, and a potentially large lease liability to plaintiff, which has now been adjudicated against it.⁴
- A deal was made October 23, 2002 to sell Opsys Limited's intellectual property and operations in the UK to CDT Acquisition Corp. which subsequently changed its name to Cambridge Display Technology, Inc. ("Cambridge"), a Delaware company that has now gone public.⁵
- To effect this transaction, Opsys Limited pushed down all of its valuable intellectual property and patents, and its UK operations, into a subsidiary known as Opsys UK.⁶
- Cambridge acquired a 16% interest in Opsys UK for \$5 million on October 23, 2002, obtaining a 98% interest in the profits of that company and full control over its technology and operations.⁷
- As part of that transaction, Cambridge purchased options to acquire the rest of Opsys UK, or all of Opsys Limited and its remaining 84% interest in Opsys UK, which held all of the transferred assets.⁸

³ At this writing, the form of Judgment presented March 20, 2007 has not been entered, but this motion assumes that a Judgment on the verdict issued March 9, 2007 will be entered at or before the hearing on this motion. Most of the facts supporting this motion are set forth as attachments to the Declarations of Robert H. Bunzel ("Bunzel Decl.") and Paul R. Ainslie ("Ainslie Decl."), referenced in the following footnotes.

⁴ Bunzel Decl. ¶ 18 and Exh. M, pp. 17-18; Ainslie Decl. ¶ 6.

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⁵ Bunzel Decl. ¶¶ 3-4 and Exhs. A-B.

⁶ Bunzel Decl. ¶ 3 and Exh. A, p. 5 of 16 WHEREAS clause (F); Ainslie Decl ¶ 5.

⁷ Ainslie Decl. ¶ 5; Bunzel Decl. ¶ 3 and Exh. A, pp. 22 of 116, § 7.1; 24 of 116, §§ 8.3, 8.4.

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- 1 • In 2002, the name of Opsys Limited's subsidiary, Opsys UK, was changed to CDT Oxford
2 Limited.⁹
- 3 • After October 2002, the Oxford-based research and development business of Opsys
4 Limited was continued by Cambridge, until July 2003, when the operations of CDT Oxford
5 Limited (formerly Opsys UK) were fully "consolidated" into Cambridge and/or
6 Cambridge's other affiliates "under one roof" in the city of Cambridge.¹⁰
- 7 • In 2004, Cambridge filed its prospectus with the Securities Exchange Commission to issue
8 public shares. In that prospectus and in its annual reports thereafter, Cambridge touted its
9 acquisition of Opsys Limited as a cornerstone of its research and development value in the
10 flat panel display niche, and noted that IPO funds would be used to pay Opsys Limited
11 liabilities.¹¹
- 12 • Just prior to its initial public offering, Cambridge elected to complete the acquisition of
13 Opsys Limited and CDT Oxford Limited (formerly Opsys UK) by acquiring 100% of the
14 stock of Opsys Limited (which owned 84% of Opsys UK) in exchange for 817,000 shares
15 of Cambridge stock.¹²
- 16 • Cambridge for accounting purposes valued the acquisition of CDT Oxford Limited
17 (holding all of the IP UK assets of Opsys Limited) at between \$19.7 million and
18 \$26.9 million.¹³
- 19 • Cambridge and the shareholders of Opsys Limited agreed to a settlement and escrow
20 mechanism whereby some of the Cambridge stock, but not all of it, that Opsys Limited's
21 shareholders were to receive from exchanging their Opsys Limited stock, would indemnify
22 Cambridge for undisclosed or contingent liabilities.¹⁴

23 ⁸ Ainslie Decl. ¶ 4 and Exh B.

24 ⁹ Bunzel Decl. Exh. C, p. 68 of 149.

25 ¹⁰ Bunzel Decl. ¶ 8 and Exh. F.

26 ¹¹ Bunzel Decl. ¶ 5 and Exh. C at pp. 29 of 149, 40 of 149, 58 of 152, 68 of 149; ¶ 7 and Exh. E
at pp. 22 of 99, 25 of 99, 30 of 99, and 36 of 99.

27 ¹² Ainslie Decl. Exh B, p. F-16.

28 ¹³ Ainslie Decl. ¶ 7 and Exh. B.

¹⁴ Bunzel Decl. ¶ 6 and Exh. D, Escrow Agreement § 4(e) at p. 43 of 58.

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- 1 • In the same month of the Cambridge public offering and the purchase of Opsys Limited
- 2 shares by Cambridge, plaintiff filed this action against Opsys Limited.¹⁵
- 3 • Opsys Limited and CDT Oxford Limited (formerly Opsys UK and once owned by Opsys
- 4 Limited) have applied for or obtained, in the name of CDT Oxford Limited, substantial
- 5 patents related to Cambridge's research and development business.¹⁶
- 6 • In 2005, *during the pendency of this case*, CDT Oxford Limited (formerly Opsys UK) was
- 7 transferred from the direct ownership (84%) of now judgment debtor Opsys Limited to
- 8 become a direct subsidiary of Cambridge.¹⁷
- 9 • After protracted and expensive litigation, the jury returned a verdict in this action on
- 10 March 9, 2007 for approximately \$4.85 million against Opsys Limited.¹⁸
- 11 • Cambridge then announced in a press release that Opsys Limited does "not have any assets
- 12 nor does it have any intellectual property rights...."¹⁹
- 13 • Cambridge directed this litigation and advanced the funds to defend it and its
- 14 representatives presided over the trial.²⁰
- 15 • The market capitalization value today of Cambridge, which includes the valuable IP and
- 16 operations from Opsys Limited that supported its public offering, is \$121 million (as of
- 17 March 30, 2007) <http://finance.yahoo.com/q?s=oled&x=0&y=0>.

18 Thus, defendant's assets, valued by Cambridge at \$19.7 million to \$26.9 million,

19 were transferred to Cambridge despite considerable debt and the potential liability to Sunnyside,

20 while Cambridge infused minimum cash into Opsys Limited in fall of 2002, with only Cambridge

21 shares delivered directly to the shareholders of Opsys Limited in 2004 to close the deal.

22 Thereafter, the only remaining asset of Opsys Limited -- its majority shareholding in CDT Oxford

23 Limited (IP and patents) -- was transferred to Cambridge in 2005 while this action was pending.

24 ¹⁵ Docket entry No. 1, Notice of Removal, attaching Complaint filed December 14, 2004.

25 ¹⁶ Bunzel Decl. ¶ 20 and Exh. O.

26 ¹⁷ Ainslie Decl. ¶¶ 9-10 and Exh. C.

27 ¹⁸ Docket entry No. 166, March 9, 2007.

28 ¹⁹ Bunzel Decl. ¶ 14 and Exh. J.

²⁰ Bunzel Decl. ¶ 19 and Exh. N; ¶¶ 12-13 and Exhs. H, I.

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1 Opsys Limited was thus 'hollowed out,' its assets stripped and transferred to Cambridge in
 2 exchange for Cambridge stock to Opsys Limited shareholders, bypassing Opsys Limited and its
 3 creditor Sunnyside. The disclosures in the Cambridge 2004 10-K, describing the acquisition of
 4 Opsys Limited, contain "unusual" awareness of prejudice to creditors. Ainslie Decl. ¶ 8, Exh. B.
 5 Although Cambridge vigorously defended this case, it now seeks to hide behind the stripped shell.

6 The Federal Rules do not condone such conduct, and equity and due process dictate
 7 that Cambridge be added as a party and judgment debtor. The remaining escrow shares, payable to
 8 Cambridge following the verdict, should be delivered to plaintiff, along with whatever additional
 9 funds from Cambridge are needed to satisfy the judgment, plus attorney's fees and costs.

10 B. Cambridge Should Be Added As A Defendant And Judgment
 11 Debtor

12 1. Cambridge Controlled the Litigation.

13 A corporation that merges with another corporation is the latter's successor for
 14 purposes of litigation. *Luxliner P.L. Export Co. v. RDI/Luxliner, Inc.*, 13 F.3d 69, 71 (3rd Cir.
 15 1993); Del. Gen. Corp. Law § 259 [merger or consolidation requires surviving corporation to pay
 16 "all debts" of any of the "constituent corporations"]; Cal. Corp. Code § 1107(a). Cambridge and
 17 Opsys Limited did not consolidate by statutory merger, but rather via an asset and stock purchase:

18 On the other hand, a corporation that acquires all of another
 19 corporation's assets without undergoing a legal merger ordinarily is
 20 not liable for a judgment as a successor [citation] ***unless it***
 21 ***controlled the litigation that resulted in the judgment, see***
 22 ***Explosives Corp. of Am. v. Garlam Enters. Corp.***, 817 F.2d 894,
 23 904-07 (1st Cir. 1987) or if there is fraud, *see Libutti*, 178 F.3d at
 24 124. (Emphasis supplied.)

25 *Koehler v. The Bank of Bermuda Ltd.*, 2002 WL 1766444 (S.D.N.Y. 2002).

26 Generally speaking, one whose ***interests were adequately***
 27 ***represented*** by another vested with the authority of representation ***is***
 28 ***bound by the judgment***, although not formally a party to the
 litigation. (Emphasis supplied.)

29 *Expert Elec., Inc. v. Levine*, 554 F.2d 1227, 1223 (2nd Cir. 1977), *cert. denied* 434 U.S. 903.

30 While Cambridge and Opsys Limited sought to avoid a statutory merger, all the earmarks of
 31 successor liability exist. A transferee may be "liable for a judgment" when (1) the transferee is a

1 bona fide successor, (2) the transferee had notice of the potential liability, and (3) the predecessor
 2 is unable to directly provide adequate relief. *Herrera v. Sing*, 118 F.Supp.2d 1120, 1123 (E.D.
 3 Wash. 2000), citing *Steinbach v. Hubbard*, 51 F.3d 843, 845-46 (9th Cir. 1995).²¹ There are strong
 4 equitable reasons for imposing liability against Cambridge, which directed the litigation with full
 5 opportunity to defend. Bunzel Decl. ¶ 19, Exh. N.²²

6 2. Application of Rules 25(c) and 69(a).

7 As stated at p. 4 of plaintiff's Post-Trial Summary of the Record filed March 20,
 8 2007, post-verdict proceedings against Cambridge or its affiliates are driven by Fed. R. Civ. P.
 9 Rules 25(c) and 69(a).²³ Rule 25(c) applies to transfers occurring at any time "after an action is
 10 brought, including after judgment is entered." *Herrera v. Sing*, *supra*, 118 F.Supp.2d at 1123,
 11 citing *USI Properties v. M.D. Construction Co.*, 186 F.R.D. 255, 260 (D. Puerto Rico 1999);
 12 *Explosives Corp. of Am. v. Garlam Enters. Corp.*, 817 F.2d 894, 907 (1st Cir. 1987); 6 *Moore's*
 13 *Federal Practice* (3d Ed.) § 25.35[1] and fn.4. Imposing successor liability involves broad
 14 equitable considerations. *Ray v. Alad Corp.*, 19 Cal.3d 22, 34 (1977).²⁴

15 Rule 69(a) provides:

16 The ***procedure on execution***, in proceedings supplementary to and
 17 in aid of a judgment, and in proceedings on and in aid of execution
shall be in accordance with the practice and procedure of the state

18 ²¹ The requirement that the party to be added to the judgment had to have controlled the
 19 litigation is to protect that party's due process rights. *Motores De Mexicali v. Superior Court*,
 51 Cal.2d 172 (1958). See also *Rest. 2d of Judgments*, § 59 (1982).

20 ²² *Oyakawa v. Gillett*, 8 Cal.App.4th 628, 631 (1992) [judgment amended; new defendant
 21 represented by original defendant's representation at trial]. Factors important to a finding of
 22 control include selection and payment of counsel, payment of litigation expenses, a written
 indemnification agreement, participation in settlement negotiations, and control over the decision
 to appeal. *TRW, Inc. v. Ellipse Corp.*, 495 F.2d 314, 318 (7th Cir. 1974); *Troy Company v.*
 23 *Products Research Company*, 339 F.2d 364, 367 (9th Cir. 1964). All are present here.

24 ²³ As one court has noted, "the judgment entered pursuant to Fed. R. Civ. P. 58 ends the
 proceeding to determine liability and relief, but it begins the collection proceeding if the defendant
 refuses to pay." *Central States Southeast and Southwest Areas Pension Fund v. Express Freight*
 25 *Lines, Inc.*, 971 F.2d 5, 6 (7th Cir. 1992).

26 ²⁴ Plaintiff is not asking the Court to reconsider the prior dismissal with prejudice as to earlier
 claims made against CDT Limited, a UK company. Rather, this motion concerns Cambridge
 27 Display Technology, Inc., a Delaware Company, and potentially CDT Oxford Limited, and does
 not assert *alter ego* claims for participating directly in the breach of lease or for fraud, which were
 28 earlier dismissed.

1 *in which the district court is held*, existing at the time the remedy is
 2 sought, except that any statute of the United States governs to the
 extent that it is applicable. (Emphasis supplied.)

3 Under Rule 69(a) “the relevant law is that of the state in which the district court is held.” Wright
 4 and Miller, Federal Practice & Procedure (2007) at § 3012. “[I]n determining the liability of the
 5 corporation’s successor for the judgment debt of the corporation, Utah [forum] corporate law was
 6 controlling when applicable.” *Id.* at fn.26, citing *Christianson v. Mechanical Contractors Bid*
 7 *Depository*, 404 F.2d 324, 325 (10th Cir. 1968).

8 In *Thomas, Head & Greisen Employees Trust v. Buster*, 95 F.3d 1449, 1456-60 (9th
 9 Cir. 1996), a judgment creditor used supplementary proceedings against non-parties to recover
 10 amounts transferred to them to satisfy his judgment, and the Ninth Circuit approved application of
 11 forum state (Alaska) law in enforcing judgment rights against non-parties.²⁵ Rule 69(a)’s
 12 requirement to apply forum state law should resolve the issue of choice of law in determining
 13 successor liability here, given the verdict and incipient judgment.

14 Rule 25(c), itself, “does not ordinarily alter the substantive rights of parties but is
 15 merely a procedural device designed to facilitate the conduct of a case.” *Luxliner, supra*, 13 F.3d
 16 at 71-2. If the Court on this motion concludes additional discovery and a later evidentiary hearing
 17 are required before Cambridge is added to the judgment (*see* section II D, *infra*), then adding
 18 Cambridge as a party may not require resolution of substantive law at this time. *See Butler v.*
 19 *Adoption Media LLC*, 2005 WL2107784*3 (ND Cal. 2005).²⁶ Ultimately, successor liability is
 20 determined by state substantive law. *Libutti v. United States*, 178 F.3d 114, 124 (2nd Cir. 1999).

21 The Ninth Circuit in *Schwartz v Pillsbury, Inc.*, 969 F.2d 840, 844-5 (9th Cir. 1992)
 22 applied California law to determine successor liability without reference to the parties’ contract,
 23

24 ²⁵ *See Peacock v. Thomas*, 516 U.S. 349, 356 (1996) [approving “broad range of supplementary
 25 proceedings involving third parties to assist in the protection of federal judgments, including
 attachment, mandamus, garnishment, and the prejudgment avoidance of fraudulent transfers.”]

26 ²⁶ Nor is there a jurisdictional issue, since “if a court has personal jurisdiction over the
 27 predecessor in interest, once successor liability is established, personal jurisdiction over the
 28 successor in interest necessarily exits.” *Select Creations, Inc. v Paliafito America, Inc.*,
 852 F.Supp. 740, 765 (ED Wis. 1994), citing *Duris v. Erato Shipping, Inc.*, 684 F.2d, 352, 356
 (6th Cir. 1982), *aff’d sub nom Pallas Shipping Agency, Ltd. v Duris*, 461 U.S. 529 (1983).

1 where imposition of successor liability “does not involve the interpretation or enforcement” of
 2 such agreement. Here, the only liability against Cambridge to be enforced is derivative of Opsys
 3 Limited’s breach of lease, Exhibit 2 at trial and Exhibit 1 to the accompanying Declaration of
 4 Alyson Huber. It provides at § 29 p. 10: “the laws of the State in which the Premises are located
 5 [California]” governs. While the Transaction Agreement between Cambridge and Opsys Limited
 6 specifies English law at § 36 (Bunzel. Decl. Exh. A), Sunnyside is *not* a party to that agreement.

7 In a lengthy analysis of choice of law in the successor liability context, the Third
 8 Circuit in *Berg Chilling Systems, Inc. v Hull Corporation*, 435 F.3d 455 (3rd Cir. 2006) held the
 9 choice of law rules of the forum state are the starting point, “because in an action based on
 10 diversity of citizenship jurisdiction we must apply the substantive law of the state in which the
 11 district court sat, including its choice of law rules.” *Id.* at 462, citing *Klaxon Co. v Stentor Elec.*
 12 *Mfg. Co.*, 313 US 487, 496 (1941).

13 Judge Alito in *Berg* did *not* apply the contractual choice of law term in the
 14 predecessor and successor corporation’s asset purchase contract, as those parties had “bargained
 15 for New Jersey law to apply to interpretation of the provisions of the contract, not to their real
 16 world effect,” and because the plaintiff “did not bargain” at all for such law while defendants had
 17 acted “to construct the asset purchase agreement specifically to avoid liability to third parties such
 18 as Berg.” *Id.* at 466 at fn.3. *Berg* ultimately turned on forum state choice of law principles.

19 Here, California’s “governmental interest approach” dictates the result. *Hurtado v.*
 20 *Superior Court*, 11 Cal.3d 574, 579-580 (1974). California law “would be displaced only if there
 21 is a compelling reason for doing so,” *Kasel v Remington Arms Co.*, 24 Cal.App.3d 711, 731
 22 (1972), and “only if our state’s interest in having its law applied was insignificant or if the other
 23 state’s law did not conflict with our state’s interests.” *Sierra-Bay Fed. Land Bank Assn. v Superior*
 24 *Court*, 227 Cal.App.3d 318, 331 (1991).²⁷ California, in protection of its resident plaintiff

25
 26 ²⁷ Delaware (Cambridge’s state of incorporation) also recognizes successor liability of third
 27 parties and the doctrine of *de facto* merger. *Fehl v. S.W.C. Corp.*, 433 F.Supp. 939, 945 (D.C. Del.
 28 1977); *Drug, Inc. v. Hunt*, 35 Del. 339, 361 (1933); *Re Xperex v. Viasystems Technologies Corp.*,
 2004 WL 3053649 *2 (Del. Ch. 2004). An analysis of successor liability under English law is
 beyond the scope of this page-limited brief, and should be unnecessary since if the foreign law is

1 Sunnyside and satisfaction of a judgment entered in this state, has a significant interest in applying
 2 California law in construing successor liability.²⁸ It would defeat the interests of justice in this
 3 state and this Court should a foreign party cause millions in legal fees and weeks of court time be
 4 spent defending its subsidiary on a local dispute, only to seek the shelter of a private contract under
 5 foreign law.²⁹ These compelling interests, coupled with the direct requirements of Rule 69(a),
 6 means California post-verdict procedures and California substantive law should apply.

7 3. State Law Procedures and Standards for Successor
 8 Liability.

9 In *McClellan v. Northridge Park Townhome Owners*, 89 Cal.App.4th 746, 752-3
 10 (2001), the court stated that under Cal. Code Civ. Proc. § 187: "a trial court has jurisdiction to
 11 modify a judgment to add additional judgment debtors," citing *NEC Electronics, Inc. v. Hurt*,
 12 208 Cal.App.3d 772, 778 (1989), and that § 187 is applicable to "successor corporation"
 13 circumstances, citing 9 Witkin, Summary of Cal. Law, "Corporations" § 19, p. 532; *see also*
 14 *Issa v. Alzamar*, 38 Cal.App.4th Supp. 1, 4 (1995) [under § 187 a court "has the authority to
 15 amend a judgment to add additional judgment debtors"]; *Hall, Goodhue, Haisley & Barker, Inc. v.*
 16 *Marconi Conference Ctr. Bd.*, 41 Cal.App.4th 1551, 1554-55 (1996).

17 To amend a judgment under § 187, two requirements must usually be met: "(1) that
 18 the new party be the alter ego of the old party and (2) that the new party had controlled the
 19 litigation, thereby having had the opportunity to litigate, in order to satisfy due process concerns."
 20 *Triplett v. Farmers Ins. Exchange*, 24 Cal.App.4th 1415, 1421 (1994). Here, Cambridge

21
 22 contrary to California's, then California choice of law rules should require this state's law be
 23 applied under the current circumstances.

24 ²⁸ "California's general policies of affording relief to its citizens who have suffered a breach of
 25 contract or a tort (*see* Civ. Code §§ 3300, 3333) and of punishing and deterring wrongful conduct
 26 (*see* Civ. Code § 3294, subd. (a)) give it a strong interest in application of its law." *Wong v.*
 27 *Tenneco, Inc.* 39 Cal.3d 126, 143 (1985), Mosk, J. dissenting.

28 ²⁹ In this Court's August 8, 2005 Order regarding plaintiff's First Amended Complaint, the Court
 applied British law in determining that *alter ego* allegations were insufficient to pierce the
 corporate veil of CDT Limited, a U.K. company. Plaintiff is not alleging here that Cambridge is
 the *alter ego* of Opsys Limited with respect to entering into or breaching the lease (as was alleged
 by former counsel), but rather that Cambridge has succeeded to the adjudicated liability of Opsys
 Limited. We are thus in a substantially different posture than the prior Order.

1 controlled the Opsys Limited defense, and it is its alter ego for successor liability under state law
2 as to this judgment, as discussed next.

3 In *Ray*, *supra*, 19 Cal.3d at 28, the California Supreme Court enumerated four
4 long-established "exceptions" to the general rule that a corporation purchasing the assets of
5 another corporation is insulated from the debts and liabilities of its predecessor:

6 (1) [t]here is an express or implied agreement of assumptions, (2) the
7 transaction amounts to a consolidation or merger of the two
8 corporations, (3) the purchasing corporation is a mere continuation
9 of the seller, or (4) the transfer of assets to the purchaser is for the
10 fraudulent purpose of escaping liability for the seller's debts.
11 [citations]³⁰

12 The *Ray* exceptions were stated again in *Beatrice Co. v. State Board of Equalization*, 6 Cal.4th 767
13 (1993), 778, and *Henkel Corporation v. Hartford Accident & Indemnity Co.*, 29 Cal.4th 934, 941
14 (2003), and are clearly in the disjunctive, such that any *one* of them may establish successor
15 liability. Here, *all* of the exceptions apply, and read together and given Cambridge's control of the
16 litigation, establish Cambridge's successor liability to plaintiff.³¹

17 4. Successor Liability Should Be Imposed on
18 Cambridge.

19 a. Assumption of Liabilities.

20 The first basis on which successor liability may be imposed is Cambridge's express
21 or implied assumption of Opsys Limited's liabilities. While the Transaction Agreement shows an
22 intent not to assume any of the US obligations (Bunzel Decl. Exh. A, p. 5 of 116), WHEREAS
23 clause(E), the Fremont lease has now been determined by the jury to be a *UK company liability*.
24 Further, Cambridge understood there was risk of undisclosed "contingent liabilities" of Opsys

25 ³⁰ The "fifth" exception created in *Ray* was for "product line" cases involving products liability,
26 not applicable here.

27 ³¹ Courts have employed successor liability in the context of defaulted leases. *Morrow v. Hood*
28 *Communications, Inc.*, 59 Cal.App.4th 924, 925 (1997) [trial court decision to that effect not
reviewed on the merits due to settlement and petition to vacate granted]; *Benaroya Capital*
Company, LLC v. EMF Partners, LLC, 2005 WL 1580041 *5 (Wash.App.Div. 2005) [on summary
judgment, trial court concluded transaction at issue "was a defacto merger. The effect of this
ruling was to make [successor] liable for [lessee's] obligations on the *Benaroya* lease."]; *5th and*
46th Co. v. Dusenberry, Ruriani & Kornhauser, 394 N.Y.S.2d 684 (1977).

1 Limited (Bunzel Decl. Exh. D, p. 43 of 58, *e.g.*), and Cambridge and its affiliates assumed future
2 liabilities of the Opsys Limited subsidiary they acquired. Bunzel Decl. Exh. A, p. 23 of 116, § 7.5.

3 Cambridge obtained contingent rights to the shares of its stock left in escrow for the
4 Opsys Limited shareholders (Bunzel Decl. Exh. D, p. 43 of 58; Exh. E, p. 25 of 99), and
5 Cambridge has apparently invaded those assets to finance this litigation. Bunzel Decl. ¶ 11;
6 Exh. G, pp. 17-18 of 59. Since the liability to Sunnyside is now clearly a UK liability, Cambridge
7 has impliedly assumed it, and has rights to remaining stock in the escrow as a consequence.

8 b. The Cambridge Transaction With Opsys
9 Limited is a *De Facto* Consolidation or
10 Merger.

11 *Marks v. Minnesota Mining and Manufacturing Co.*, 187 Cal.App.3d 1429, 1435
12 and fn.13 (1987) held that: “[w]here the consideration consists wholly of shares of the purchaser’s
13 stock which are promptly distributed to the seller’s shareholders in conjunction with the seller’s
14 liquidation,” liability for the predecessor’s debts generally follows, *quoting Shannon v. Samuel*
15 *Langston Co.*, 379 F. Supp. 797, 807 (W.D. Mich. 1974). Five relevant factors apply:

16 (1) was the consideration paid for the assets solely stock of the
17 purchaser or its parent; (2) did the purchaser continue the same
18 enterprise after the sale; (3) did the shareholders of the seller become
19 the shareholders of the purchaser; (4) did the seller liquidate; and (5)
20 did the buyer assume the liabilities necessary to carry on the
21 business of the seller.

22 *Marks, supra*, at 1436; *Franklin v. USC Corp.*, 87 Cal.App.4th 615, 626 (2001). All apply here.

23 First, Cambridge acquired Opsys Limited by issuing 797,695 shares of Cambridge
24 stock and an additional 19,736 of Cambridge stock to two former Opsys Limited directors. Ainslie
25 Decl. Exh. B. This stock transfer satisfies the first factor.³²

26 The second factor, continuation of the business after sale, is also evident from the
27 SEC filings, showing that Opsys assets have flowed into Cambridge directly to support its core
28 research and development business:

In 2002, as part of our IP expansion strategy, *we acquired control of*
CDT Oxford Limited (formerly known as Opsys UK Limited),

³² The 2002 \$5 million cash contribution was for a controlling interest in the affiliate, not directly for acquisition of Opsys Limited, which later in 2004 was a 100% stock deal.

1 which owns or controls a number of patents protecting the use of
 2 dendrimers to make solution processable phosphorescent materials.
 3 This *allows us to develop proprietary materials which we believe*
have the potential to form the basis of a future generation...
 (Emphasis supplied.)

4 Bunzel Decl. Exh. C, Prospectus at p. 58 of 149. Cambridge has "had full management control
 5 over CDT Oxford since October 2002 and have been responsible for funding its operations." *Id.* at
 6 p. 40 of 149. All Opsys R&D was absorbed by Cambridge "under one roof" as of July 2003.
 7 Bunzel Decl. Exh. F.

8 The third factor, did the shareholders of the seller become the shareholders of the
 9 purchaser, is established by the Settlement Agreement and Amendment which describes how the
 10 shares will be distributed to Opsys Limited's shareholders (Bunzel Decl. Exh. D), and the 2004
 11 10-K description of the ultimate acquisition through a 100% stock deal. Ainslie Decl. Exh. B.

12 The fourth factor, did the seller liquidate, is also established by the public filings
 13 and press releases showing that all assets and operations of Opsys Limited have been transferred to
 14 Cambridge, and that Opsys Limited has no assets following the transfer of its majority stockholding
 15 position in CDT Oxford Limited to Cambridge. Ainslie Decl. ¶ 9, Exh. C; Bunzel Decl. Exhs. F
 16 and J.

17 The fifth and final factor, whether the buyer assumed the liabilities necessary to
 18 carry on the business of the seller, is also met here. Cambridge expressly assumed the operational
 19 liabilities of Opsys UK (holding the assets of Opsys Limited), which was formed to carry on the
 20 judgment debtor's R&D business. Bunzel Decl. Exh. A, p. 23 of 116, § 7.5.

21 c. Cambridge Continued Opsys Limited's R&D
 22 Business, Providing Only Inadequate
Consideration.

23 The public filings of Cambridge are replete with statements that Cambridge has
 24 continued the research and development business and operations of Opsys Limited, and that it has
 25 succeeded to the assets of Opsys Limited. The 2002 Transaction Agreement permitted Cambridge
 26 to "control" the "operations" of the Opsys Limited subsidiary (Opsys UK) created to hold all
 27 Opsys UK operations and all of its IP and assets. Bunzel Decl. ¶ 3 and Exh. A pp. 22 of 116, § 7.1;

24 of 116, §§ 8.3, 8.4. Thereafter, those operations and assets were folded into Cambridge, forming a cornerstone for Cambridge's IPO.³³

The California Supreme Court in *Ray* stated that "a corporation acquiring the assets of another corporation is the latter's mere continuation and therefore liable for its debts" upon "a showing of one or both of the following factual elements":

(1) no adequate consideration was given for the predecessor corporation's assets and made available for meeting the claims of its unsecured creditors; (2) one or more persons were officers or directors or stockholders of both corporations.

Ray, supra, 19 Cal.3d at p. 29; *Franklin v. USX Corp., supra*, 87 Cal.App.4th at p. 626. The Ninth Circuit in *Katzier's Floor and Home Design, Inc. v. M-MLS.com*, 394 F.3d 1143, 1150 (9th Cir. 2004), in applying California law, noted that:

The requirement of inadequate consideration in a successor liability case is premised on the notion that when a successor corporation acquires the predecessor's assets without paying adequate consideration, the successor deprives the predecessor's creditors of their remedy.³⁴

Here, the research and development business activities of Opsys Limited/Opsys UK continued after the Cambridge acquisition, ultimately under "one roof." Bunzel Decl. Exh. F. Nor can there be any legitimate dispute that any cash provided by Cambridge in 2002 was "inadequate" to satisfy Opsys Limited's debts or that this money was "made available" for that purpose to Sunnyside. Ainslie Decl. ¶ 6, Exh. B, p. F-15; Bunzel Decl. Exh. M, pp. 17-18. Just the opposite is true. Further, following the consolidation of Opsys and Cambridge, Opsys Limited's financial controller became a director of the surviving subsidiary Opsys UK, which became CDT Oxford Limited, and Mr. Holmes (who testified at trial) became an observer on the Cambridge board. Bunzel Decl.

³³ Bunzel Decl. ¶ 5 and Exh. C at pp. 29 of 149, 40 of 149, 58 of 152, 68 of 149; ¶ 7 and Exh. E at pp. 22 of 99, 25 of 99, 30 of 99, and 36 of 99; Exh. F [press release re consolidating operations under one roof]; Exh. M [patents].

³⁴ In *Monarch Bay II v. Prof'l Serv. Indus., Inc.*, 75 Cal.App.4th 1213 (1999), the court indicated there must be a causal relationship between a successor's acquisition of assets and the predecessor's creditors inability to get paid. That causal relationship is clearly established here, since significant Cambridge stock consideration (valued at between \$12 million and 19 million in 2002 or 2004) has not been paid to satisfy Opsys Limited's creditors, including Sunnyside.

1 Exh. P. There is no question that Opsys Limited shareholders became Cambridge shareholders.
 2 Bunzel Decl. Exh. D.

3 d. The Transfer of Opsys Limited's Assets to
 4 Cambridge Was for the Purpose of Avoiding
Opsys Limited's Debts Including to
 5 Sunnyside.

6 The fourth exception for imposing successor liability on Cambridge, that the
 7 transfer of assets was for the fraudulent purpose of escaping liability for the seller's debts, is
 8 equally applicable here. How else can one interpret the following statement in the Cambridge
 9 2004 10-K summarizing the Opsys transaction?

10 The terms of the Transaction Agreement were entered into by the
 11 Company so that it could gain control of an economic interest in
 12 the UK assets and operations of Opsys (which had been
 13 transferred to Opsys UK immediately prior to the transaction) in
 14 such a manner to avoid acquiring any interest in any other assets
 15 or liabilities of Opsys. (Emphasis supplied.)

16 Ainslie Decl. ¶ 8 and Exh. B, p. F-15. If that were not brazen enough, in 2005 defendants during
 17 the pendency of this action transferred the patent-rich CDT Oxford Limited subsidiary, owned
 18 84% by Opsys Limited when the case began, to Cambridge directly, leaving Opsys Limited,
 19 according to Cambridge, with "no assets." Ainslie Decl. ¶¶ 9-10 and Exh. C; Bunzel Decl. ¶ J.

20 Opsys Limited, directed by Cambridge, argued at trial that in 2002 it was
 21 essentially insolvent such that the Cambridge transaction was the only solution. Attached as
 22 Exh. L, p. 102, to the Bunzel Decl. is testimony from Opsys Limited's expert Terry Lloyd,
 23 summarizing Opsys Limited's September 30, 2002 financial statements to that effect. Plaintiff's
 24 consultant, Mr. Ainslie, in his current declaration, concludes that any cash provided by Cambridge
 25 in 2002 was inadequate to pay Opsys Limited's then-stated debts in excess of £17 million British
 26 pounds (not including the liability now determined by the jury here). Ainslie Decl. ¶ 6; Bunzel
 27 Decl. Exh. M, pp. 17-18.

28 The Cambridge and Opsys Limited consolidation, extracting value for the assets of
 Opsys Limited by creating subsidiaries and then going 'around' the company and its liabilities
 such as the Sunnyside lease, were the mechanisms of ambitious young businessmen whom the

1 Court saw at trial. California has adopted the Uniform Fraudulent Transfer Act, Cal.Civ. Code
 2 §§ 3439, *et seq.*, and §§ 3439.07-08 of that Act provides for voiding such transfers "to the extent
 3 necessary to satisfy the creditor's claim."³⁵ Cambridge is the transferee and a proper defendant.

4 5. Alternatively, An Evidentiary Hearing After
 5 Discovery May Be Appropriate, As Well As Claims
 6 Against Cambridge Or CDT Oxford Limited For
 7 Fraudulent Conveyance.

8 In *Luxliner*, *supra*, 13 F.3d at 72, the Third Circuit evaluated due process concerns
 9 of third parties under Rule 25(c), concluding: "at a minimum, notice and an opportunity to be
 10 heard are required." Here, Cambridge has been on actual and participating notice since at least
 11 November 2005 of its potential liability, and it threw the kitchen sink at defense of this case. In
 12 determining how to proceed under Rule 25(c), the Third Circuit in *Luxliner* wrote:

13 [A]t least in a context such as this in which a decision on a
 14 Rule 25(c) motion effectively imposes liability, the court must first
 15 determine whether the affidavits "show that there is no genuine issue
 16 as to any material fact and that the moving party is entitled to joinder
 17 or substitution as a matter of law." *C.f.* Fed. R. Civ. P. 56(c). If they
 18 do, the court should grant the motion; if they do not, however, the
 19 court should conduct an evidentiary hearing to decide whether the
 20 motion should be granted. *See* Fed. R. Civ. P. 43(e).

21 In *Luxliner*, because facts were disputed and the credibility of explanations for some of them were
 22 at issue, "the district court should have held an evidentiary hearing." *Id.* at pp. 75-6.

23 While Sunnyside believes the public record facts and Cambridge's participation to
 24 date mandate that Cambridge should be added to the judgment, we anticipate Cambridge will
 25 respond to this motion with a panoply of corporate details, argument and data not previously seen
 26 or discovered by plaintiff. No reply brief is envisioned per this Court's scheduling order following
 27 the post-trial CMC. Application of successor liability can be "extremely fact sensitive." *Fisher v.*
 28 *Allis Chalmers Corp. Product Liability Trust*, 95 Cal. App. 4th 1182, 188 (2002). If an evidentiary
 29 hearing is required, plaintiff seeks leave under Rule 69(a) to conduct discovery related to the

30 ³⁵ Plaintiff's motion here is timely, and was initially brought and has been pending in this Court
 31 since no later than November 2, 2005. *See* pp. 2-3 of plaintiff's Post-Trial Summary of the Record
 32 filed March 20, 2007. Indeed, the final and perhaps most alarming transfer that occurred during
 33 the pendency of this case occurred only in 2005. Ainslie Decl. ¶ 10.

1 transfer of Opsys Limited assets to Cambridge and CDT Oxford Limited (formerly Opsys UK and
2 once owned by Opsys Limited).

3 Plaintiff will be prepared May 16 to identify the discovery required against
4 Cambridge and its affiliates, which would likely involve document requests and several
5 depositions.

6 Plaintiff may also seek leave to file a supplemental claim for relief for fraudulent
7 conveyance against Cambridge and CDT Oxford Limited, pursuant to Fed.R.Civ.P. Rule 18(b), so
8 as to restore to Opsys Limited for the benefit of Sunnyside all or a part of the IP assets and patents
9 from which the judgment might be satisfied. *See Panther Pumps & Equipment Co. v. Hydrocraft,*
10 *Inc.* 566 F.2d 8, 25-7 (7th Cir. 1977).

11 IV. CONCLUSION

12 Sunnyside requests that the Court award the attorney's fees, costs and expenses
13 incurred in prosecuting this breach of lease case, defending against the Assignment, and its
14 post-trial and estimated fees and expenses.

15 Sunnyside asks the Court to apply appropriate state law and hold Cambridge
16 responsible for the judgment. Alternatively, prompt discovery and an evidentiary hearing pursuant
17 to Rules 69(a) and 25(c) should be ordered with leave to file a fraudulent conveyance claim if
18 needed.

19 DATED: April 2, 2007

BARTKO, ZANKEL, TARRANT & MILLER
A Professional Corporation

21 By: 
22 _____

23 Robert H. Bunzel
24 Attorneys for Plaintiff
25 SUNNYSIDE DEVELOPMENT CO., LLC
26
27
28

RJN 135

EXHIBIT N

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 Alyson L. Huber, State Bar No. 202713
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 A Professional Corporation
 3 900 Front Street, Suite 300
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 5
 6 Attorneys for Plaintiff
 SUNNYSIDE DEVELOPMENT CO., LLC

7
 8 UNITED STATES DISTRICT COURT
 9 NORTHERN DISTRICT OF CALIFORNIA
 10

11 SUNNYSIDE DEVELOPMENT COMPANY,)
 LLC,)

12 Plaintiff,

13 v.

14 OPSYS LIMITED, a United Kingdom
 15 Company; and CDT LIMITED, a United
 Kingdom Company,

16 Defendants.
 17

No. C 05-00553 MHP

**DECLARATION OF PAUL R.
 AINSLIE RE MOTION TO ADD
 CAMBRIDGE DISPLAY
 TECHNOLOGY, INC. AS A PARTY
 TO ACTION AND JUDGMENT**

Hearing Date: May 16, 2007
 Time: 1:00 p.m.
 Courtroom: 15

RJN 136

BARTKOZANKEL
 900 Front Street, Suite 300
 San Francisco, CA 94111
 Phone (415) 956-1900 • Fax (415) 956-1152

1 I, PAUL R. AINSLIE, declare as follows:

2 1. I am a Certified Public Accountant and a partner in the accounting firm of
3 Odenberg, Ullakko, Muranishi & Co. LLP. I have personal knowledge of the matters stated herein
4 except as to statements based on information and belief (and as to those matters, I believe them to
5 be true) and, if called upon as a witness, I could and would competently testify thereto. My CV is
6 attached hereto as Exhibit A, and I testified at deposition and at trial in this cause.

7 2. I was retained by plaintiffs in this case in part to evaluate the damages
8 suffered by plaintiff Sunnyside Development LLC ("Sunnyside"), including how the acquisition of
9 Opsys Limited by Cambridge Display Technology, Inc. ("Cambridge") or its affiliates may have
10 violated the subject lease as an unconsented assignment. My earlier damages schedules included a
11 column showing approximately \$596,000 (10% of the unpaid base rent) in increased damages due
12 to the transfer to Cambridge. I understand that this additional damage column was not submitted
13 in the final version of the damages schedule (Exhibit 60 at trial) that went to the jury.

14 3. In conducting the analysis regarding the Cambridge transaction, I reviewed
15 in detail the Cambridge annual 2004 Form 10-K submitted in March of 2005 to the SEC. In my
16 profession it is customary to rely on such SEC submissions because a public company's and its
17 auditors are required to fairly and accurately reflect information related to the financial condition
18 of the company.

19 4. Attached hereto as Exhibit B are pages F-14 through F-16 of the Cambridge
20 2004 10-K, which are the audited financial statement notes regarding the acquisition of CDT
21 Oxford Limited (formerly Opsys UK). In general, the notes describe a 2-step transaction by which
22 Cambridge in October 2002 acquired a 16% equity interest in Opsys Limited's subsidiary Opsys
23 UK (now known as CDT Oxford Limited), plus control, and then at December 2004 concluded the
24 transaction by acquiring the other 84% interest through exchanging Cambridge stock for 100% of
25 the stock of Opsys Limited, which at that time owned 84% of CDT Oxford Limited.

26 5. The notes describe that the cash paid by Cambridge in 2002 was \$2 million
27 for an Opsys Limited technology license, \$500,000 for an option to buy the balance of CDT
28

1 Oxford Limited, and \$2.5 million for the 16% stock interest in Opsys UK (CDT Oxford Limited).
 2 I understood from the 10-K and the Transaction Agreement attached thereto, that all of the UK
 3 assets and related IP of Opsys Limited had been pushed down to Opsys UK as a necessary
 4 predicate to the Cambridge transaction.

5 6. In reading the audited financial statements of Opsys Limited for the period
 6 ending September 30, 2002, and audited by Deloitte, I note that total liabilities of Opsys Limited at
 7 that time were in excess of £17 million British pounds, not inclusive of the lease liability to
 8 Sunnyside, such that any or all of the \$5 million in cash paid by Cambridge in 2002 was
 9 inadequate to satisfy Opsys Limited's creditors.

10 7. Cambridge in the 2004 10-K reflected the fair value of the acquisition of
 11 Opsys UK (CDT Oxford Limited), which held all of the assets of Opsys Limited regarding the UK
 12 operations, at \$26.894 million in October 2002, adjusted at December 2004 to \$19.679 million due
 13 to changes in the value of Cambridge stock going to the Opsys Limited shareholders. In my
 14 experience, shareholders and third parties reviewing the 10-K would reasonably conclude, as I do,
 15 that these numbers reflect Cambridge's best determination of the value of the transaction to
 16 Cambridge.

17 8. Page F-15 of the 2004 10-K (Exhibit B hereto) is instructive regarding the
 18 intent of the parties:

19 The terms of the Transaction Agreement were entered into by the
 20 Company so that it could gain control of and economic interest in the
 21 UK assets and operations of Opsys (which had been transferred to
 22 Opsys UK immediately prior to the transaction) in such manner to
 avoid acquiring any interest in any other assets or liabilities of
 Opsys.

23 In my experience as a public accountant for over 30 years, this is unusual language, and I do not
 24 recall seeing it before. I believe it was likely inserted by the auditors to disclose that the purpose
 25 of the transaction may be inconsistent with the interests of creditors of Opsys Limited. In my
 26 experience the complex 2-step transaction here was indeed contrary to the interests of creditors of
 27 Opsys Limited, since significant value in the form of Cambridge stock was to be delivered outside
 28

1 of Opsys Limited to its shareholders, even though Cambridge through its affiliate CDT Oxford
 2 Limited would end up with ownership and control of valuable IP that had belonged to Opsys
 3 Limited.

4 9. Subsequent to the trial, I have been asked to examine various public filings
 5 of Cambridge regarding changes to the ownership of CDT Oxford Limited (formerly Opsys UK),
 6 especially the "List of Subsidiary" information for Cambridge filed with the SEC between 2004
 7 and 2006. I have attached hereto as Exhibit C the SEC filing indices and "List of Subsidiary"
 8 information for Cambridge, including its:

9 S-1 for Public Offering, filed July 30, 2004

10 10-K annual report for period ending Dec. 30, 2004, filed March 31, 2005

11 10-K annual report for period ending Dec. 30, 2005, filed March 14, 2006

12 10-K annual report for period ending Dec. 30, 2006, filed March 1, 2007

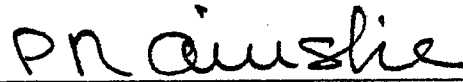
13 As an accountant familiar with these listings, it is apparent that at July 30, 2004, the company CDT
 14 Oxford Limited was listed as being owned 16% by Cambridge and subject to Cambridge's control;
 15 at December 31, 2004, CDT Oxford Limited was listed as a subsidiary of Opsys Limited, which in
 16 turn was listed as a subsidiary of Cambridge following completion of the transaction whereby
 17 Cambridge acquired 100% of Opsys Limited's stock in December 2004; and by December 31,
 18 2005, CDT Oxford Limited was no longer listed as a subsidiary of Opsys Limited but was instead
 19 a direct subsidiary of Cambridge, and this pertained as well at December 31, 2006.

20 10. What this shows is that sometime in 2005, during the pendency of this case,
 21 the company CDT Oxford Limited was transferred from the ownership of Opsys Limited, the
 22 defendant in this action, to Cambridge as a direct subsidiary. CDT Oxford Limited was the entity
 23 whose acquisition had been valued at \$26.9 million by Cambridge, and which held the UK IP
 24 assets that once belonged to Opsys Limited.

25 11. I have not yet reviewed (since I understand Sunnyside does not have access)
 26 the actual contracts and records of Cambridge not attached to the SEC filings, and would expect to
 27

1 review them to complete an opinion as to whether Opsys Limited on behalf of its creditors
2 received fair value for the transfers of (i) Opsys Limited assets to the control of Cambridge and (ii)
3 CDT Oxford Limited and its assets to Cambridge. At this stage in the proceedings, my initial
4 opinion is that the series of transactions were either designed to or had the effect of impairing the
5 interests of Opsys Limited creditors including Sunnyside.

6 I declare under penalty of perjury under the laws of the state of California that the
7 foregoing is true and correct and that this Declaration was executed March 30, 2007 at San
8 Francisco, California.

9
10 

11 PAUL R. AINSLIE
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RJN 140

Exhibits O-T to Request for Judicial Notice

EXHIBIT O

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Alyson L. Huber, State Bar No. 202713
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Attorneys for Plaintiff
SUNNYSIDE DEVELOPMENT CO., LLC

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SUNNYSIDE DEVELOPMENT COMPANY,)
LLC,)

Plaintiff,

v.

OPSYS LIMITED, a United Kingdom)
Company,)

Defendant.)

No. C 05-00553 MHP

**DECLARATION OF ROBERT H.
BUNZEL RE MOTION TO ADD
CAMBRIDGE DISPLAY
TECHNOLOGY, INC. AS A PARTY
TO ACTION AND JUDGMENT**

Hearing Date: May 16, 2007
Time: 1:00 p.m.
Courtroom: 15

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RJN 141

I, ROBERT H. BUNZEL, declare as follows:

1. I am counsel for plaintiff Sunnyside Development, LLC in this action. As such I have personal knowledge of the within facts, except those alleged on belief, which I believe to be true, and I am competent to testify thereto if called upon to do so.

2. This Declaration supports plaintiff's motion to add Cambridge Display Technology, Inc. ("Cambridge"), a Delaware corporation, as a party to the action and judgment, and for related relief, by attaching and highlighting selected Cambridge publicly-filed Securities Exchange Commission ("SEC") records, Cambridge public press releases, publicly available list of patents associated with Opsys Limited and now Cambridge, and certain relevant exhibits and transcripts produced in this action.

3. Attached hereto as **Exhibit A** is a true copy of the Transaction Agreement dated October 23, 2002 between Cambridge (formerly known as CDT Acquisition Corp.) and Opsys Limited and several of their affiliates, which was first filed with the SEC July 30, 2004 with Cambridge's Form S-1 as Exh. 10.3 At p. 5 of 16, in "Whereas" clause (F), the parties stated:

CDT [Cambridge] and Opsys [Opsys Limited] have agreed that all of the assets used by Opsys in the course of or required to operate its business in the United Kingdom including all intellectual property¹ . . . shall be transferred to Opsys UK on and subject to the terms of a hive down agreement to be entered into between Opsys and Opsys UK. (Emphasis supplied.)

At "Whereas" clause "E," the Transaction Agreement provides: "it is the intention" that "Opsys will be restructured so that its subsidiaries . . . and any other operations located in the United States of America and all liabilities or obligations of any kind relating to such operations including liabilities relating to all employees retained by such business are divested into a

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¹ In the Opsys Limited/Opsys UK Agreement, attached to the S-1 as Exh. 10.4, Opsys Limited's "Intellectual Property" transferred to its then subsidiary Opsys UK, is defined at § 1.1 (Definitions) as: "means patents, trade marks, service marks rights in designs, trade or business names, trade secrets, know-how, copyrights, topography rights and rights in databases (whether or not any of these is registered and including applications for registration of any such thing) and all rights or forms of protection of a similar nature or having equivalent or similar effect to any of these which may subsist anywhere in the world."

<http://www.sec.gov/Archives/edgar/data/1297968/000119312504128258/dex104.htm>.

1 newly-incorporated company.” However, the jury has now determined that the Fremont lease
2 liability remained with Opsys Limited, the UK company.

3 At p. 22 of 116, § 7.1, of the Transaction Agreement, the parties agreed:

4 Effective from the date of this agreement, CDT UK [Cambridge
5 Display Technology Ltd., wholly owned by Cambridge] shall on an
6 exclusive and irrevocable basis manage the assets and business of
7 Opsys UK generally and in particular (Emphasis supplied.)

8 At p. 23 of 116, § 7.5 of the Transaction Agreement, the parties agreed:

9 CDT and CDT UK shall be responsible for all liabilities arising from
10 its management of Opsys UK and shall indemnify Opsys and the
11 directors of both Opsys UK and Opsys against all claims arising
12 from such liabilities.

13 Page 24 of 116, § 8.3 of the Transaction Agreement recites certain corporate acts that Opsys UK
14 [holding all of the UK assets of Opsys Limited] could not take “without the prior written approval
15 of CDT.” Again, at p. 38 of 116, § 18, the parties agreed, “Between the date of this agreement and
16 Completion [defined as Cambridge’s subscription for shares in Opsys UK] that Opsys would not
17 take “any action” that “could reasonably be expected to be material to the business of [Opsys] UK
18 after Completion without having in each case the consent in writing of CDT [Cambridge], such
19 consent not to be unreasonably withheld.” See also p. 96 of 116, at Schedule 5 of the Transaction
20 Agreement, listing a series of business activities for Opsys UK that are prohibited.

21 4. Attached hereto as **Exhibit B** is the October 28, 2002 Cambridge press
22 release announcing the Opsys transaction and describing “Opsys” at p. 2 as “Opsys Limited,” the
23 defendant here. At p. 1, Michael Holmes, “CEO of Opsys,” who testified March 2, 2007 in this
24 action, is quoted by Cambridge:

25 We believe that this transaction will combine the strengths of two
26 dynamic teams, which are working together with the UK’s two
27 leading universities, to further advance display technology.

28 5. Attached hereto as **Exhibit C** is a true copy of the December 15, 2004
Prospectus for Cambridge in connection with its 2004 public offering of stock, and filed with the
SEC. At p. 40 of 149, Cambridge represented to the investing public: **RJN 143**

We acquired a 16% equity interest in CDT Oxford Ltd. [formerly
Opsys UK, holding all of the UK and IP assets of Opsys Limited] in

October 2002. CDT Oxford carries out research in high-efficiency P-OLED materials and is 84% owned by Opsys Limited. However, we have full management control over this company and are responsible for funding its operations. (Emphasis supplied.)

At p. 48 of 149, the Prospectus states:

[N]et cash used in investing activities for the year ended December 31, 2002 was \$9.4 million, of which \$5.0 million was used to acquire control of CDT Oxford (Emphasis supplied.)

At p. 68 of 149, the Prospectus states:

The only material asset of Opsys Limited is its shareholding in CDT Oxford [formerly Opsys UK, holding all of the UK assets and IP of Opsys Limited]. Because of these conditions, and because Opsys Limited has no operations, we do not believe that it will make a material difference as to whether we acquire the remaining stock in CDT Oxford or whether we acquire the entire share capital of Opsys Limited. . . . CDT Oxford also has a large body of know-how concerning the development of solution processable phosphorescent materials. This allows us to develop and to patent materials that we believe have the potential to form the basis of a future generation of high-efficiency materials thus enhancing our IP portfolio with respect to the future market for OLED displays (Emphasis supplied.)

Later filings, including Exhibit E hereto, establish that Cambridge completed the acquisition of Opsys through a stock-for-stock transaction in December 2004, exchanging Cambridge stock for 100% of the stock of Opsys Limited, the judgment debtor here.

6. Attached hereto as Exhibit D is the Settlement and Amendment Agreement between Cambridge and Opsys Limited and certain of its affiliates and shareholders related to the acquisition of Opsys Limited by Cambridge, and filed with the SEC in March 2005 as Exhibit 10.45 to Exhibit E to this Declaration. Such agreement attaches and incorporates a form of Escrow Agreement at pp. 39 of 58 through 53 of 58, by which certain shares of Cambridge are held in escrow pending satisfaction of contingent liabilities. Subparagraph 4(e) at p. 43 of 58 provides:

In the event Buyer [Cambridge] determines that any liability, contingent liability, claim, obligation or damage (collectively "Claim") exists or has been asserted against Opsys (other than the Identified Liabilities . . .) prior to the termination of the Escrow Account hereunder, Buyer shall have the right (but not the obligation) to deliver to the Escrow Agent, with a copy to New Co, a written notice . . . and . . . payment instructions specifying the

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1 number of CDT [Cambridge] Shares to be transferred to Buyer in
 2 respect thereof... that shall most nearly equal the amount of the
Claimed Amount.” (Emphasis supplied.)

3 7. Attached hereto as **Exhibit E** is a true copy of the Cambridge Form 10-K
 4 for the year ended December 31, 2004 and filed with the SEC in March 2005. At p. 12 of 19
 5 thereof, Cambridge stated:

6 In 2002, as part of our IP expansion strategy, we acquired control of
 7 CDT Oxford Limited (formerly known as Opsys UK Limited),
 8 which owns and controls a number of patents protecting the use of
dendrimers to make solution processable phosphorescent materials.
(Emphasis supplied.)

9 At p. 22 of 99, the 2004 10-K provides:

10 In October 2002, control of CDT Oxford [Opsys UK, holding all of
 11 the UK assets of Opsys Limited] was acquired and its loss has been
 12 accounted for from October 2002 until December 2003 under the
 equity method. From January 2004, CDT Oxford has been fully
consolidated into our results. (Emphasis supplied.)

13 At p. 25 of 99, the 2004 10-K explains that Cambridge Display Technology, Inc. was “formerly
 14 known as CDT Acquisition Corp., a Delaware corporation.” At p. 29 of 99, the 2004 10-K
 15 provides:

16 We acquired a 16% equity interest in CDT Oxford Limited in
 17 October 2002. CDT Oxford carries out research in high-efficiency
 18 P-OLED materials and was 84% owned by Opsys Limited. In
 19 December 2004, we acquired the remaining 84% of CDT Oxford.
 20 We have had full management control over CDT Oxford since
 21 October 2002 and have been responsible for funding its operations
since that time. Until December 2003, we accounted for 100% of
the results of this company in a manner similar to the equity method.
Commencing January 1, 2004, we consolidated CDT Oxford as a
subsidiary pursuant to the terms of FIN no. 46 R. (Emphasis
 supplied.)

22 Further on that page, the 2004 10-K provides:

23 The Amended and Restated Settlement and Amendment Agreement
 24 [Exhibit D to this Declaration] provides for an escrow of
 25 approximately 53% of the shares issuable to the Opsys shareholders
 against certain contingent liabilities and the possibility that other
liabilities will emerge. (Emphasis supplied.)

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26 At p. 30 of 99, the 2004 10-K provides:

27 Good will is included in the balance sheet as a result of our
 28 acquisition of the UK members of the CDT group in 1999 and the

consolidation of CDT Oxford in 2004. We perform an annual impairment test on the value of goodwill and, to date, have concluded that no impairment is required. For purposes of this impairment test, we have concluded that the CDT group is one reporting unit. (Emphasis supplied.)

At p. 36 of 99 in describing total research and development expenses, the 2004 10-K provides:

The remainder of the decrease (and expenses) was due to a reorganization of research facilities and staff in the second half of 2003, including the relocation of the former CDT Oxford offices in Oxford, England, to Cambridge, England, and the consolidation of all of our clean room facilities within our Technology Development Center. (Emphasis supplied.)

8. Attached hereto as **Exhibit F** is a true copy of Cambridge's July 3, 2003 press release, advising of a "reorganization" and "consolidation of resources under one roof":

In September 2002, CDT [Cambridge] acquired the rights to develop the technology of Opsys Ltd., an Oxford-based developer of high-efficiency, next-generation LED materials - light emitting dendrimers. Since then CDT has carried on similar work in both Oxford and Cambridge. In the first major move for enhanced efficiency, CDT will close the Oxford facility and move key scientists to Cambridge as part of a new "high Efficiency Materials" research group, focused on next-generation materials research.

9. The accounting treatment for the acquisition of CDT Oxford (formerly Opsys UK, holding all of the assets of Opsys Limited) is described in detail in the notes to the 2004 Cambridge financial statements at pp. 80 of 99 - 82 of 99 (F-14-F-16) of Exhibit E. In particular, for accounting purposes, Cambridge reported that:

[s]ince the equity in CDT Oxford is not sufficient to permit it to finance its activities without outside support, this has resulted in the Company consolidating CDT Oxford.

10. The financial statement notes in the 2004 Cambridge 10-K at Exhibit E, show an accounting for "the original acquisition of CDT Oxford" as a purchase, at \$26.894 million (p. 80 of 99, Exh. E), which had included the exchange of "all of the outstanding stock of Opsys [Opsys Limited] in exchange for the 679,000 of the company's Class A common stock" at a "deemed price" of \$27.60 per share. (*Id.*, at p. 81 of 99.) Following the Cambridge IPO and in connection with "the initial public offering price of \$12 per share," the "value of that [Cambridge stock exchanged for Opsys Limited stock] was \$9.8 million which reduced the "total purchase

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consideration" by \$7.215 million (*id.*, p. 82 of 99). Thus, for accounting purposes, the acquisition of CDT Oxford Ltd. (formerly Opsys UK), which held the Opsys Limited assets, was valued at between \$19 million and \$27 million to Cambridge.

11. Attached hereto as **Exhibit G** is a true copy of Cambridge's Form 10-Q for the period ending June 30, 2005. At pp. 17 of 59-18 of 59, in describing the current action, this 10-Q provides:

When the Company acquired Opsys Limited for stock in December 2004, a proportion of the stock consideration was issued to the former owners of Opsys Limited but was held in escrow. In the event that the Company suffers a loss in relation to either of the claims against Opsys Limited [the claim by Dr. Reddy and the claim by Sunnyside], shares currently held in escrow shall be forfeited to the value of the loss, as measured at the December 2004 initial public offering price of \$12 per share. The value of the 422,610 shares held in escrow, based on the market price of \$7.74 per share at June 30, 2005 is \$3.3 million. The escrow shares are authorized and issued in the accompanying financial statements. Costs that the Company incurs in relation to the claims described above are charged to the operating expense as incurred. (Emphasis supplied.)

12. Attached hereto as **Exhibit H** is Cambridge's Form 10-K for the fiscal year ending December 31, 2005. At p. 30 of 99, in describing this action, the 2005 10-K provides:

The claim against Opsys Limited for breach of contract will proceed to trial. We continue to believe (and have been so advised by external counsel) that the claim will fail.... The actual cost of resolving any claims may be substantially different from the amounts of liability recorded. We have not recorded any liability with respect to the claim from Sunnyside described above. (Emphasis supplied.)

Further, the 2005 10-K states and clarifies at p. 80 of 99:

The Company owns 100% of CDT Oxford, formerly Opsys UK, and 100% of Opsys Limited and consolidates both of these into its consolidated results of operations, financial position and cash flows. (Emphasis supplied.)

13. Attached hereto as **Exhibit I** is Cambridge's Form 10-K for the period ending December 31, 2006. The 2006 10-K at p. 25 of 92 provides:

We are subject to developments in and expenses associated with resolving matters currently in litigation.

We have been and may continue to be the subject of complaints or litigation in connection with disputes unrelated to patent or other IP

rights described above. We are currently the subject of litigation with Sunnyside Development as described under "Legal Proceedings" in Item 3 of Part I above. There is considerable risk associated with any litigation, particularly litigation such as this action which may be decided by a jury and the outcome of which will be affected by a number of factors beyond our control. As is also the case with other complaints or litigation to which we may become subject, we may incur significant legal costs in defending or settling the action with Sunnyside Development and, if a court finds against us, we could be liable for substantial financial damages or suffer other losses that are the subject of dispute. (Emphasis supplied.)

Also, at p. 77 of 92 of the 2006 10-K, the current status of the escrow account is described (p. F-15).

14. Attached hereto as **Exhibit J** is Cambridge's March 12, 2007 press release announcing the verdict in this action:

CDT [Cambridge] does not intend to assist Opsys Limited with any funding for settlement of the award of damages. Opsys Limited does not have any assets, nor does it have any intellectual property rights which are relevant to CDT's business.

15. Attached hereto as **Exhibit K** is a true copy of what was marked as Exhibit 51 to the deposition of Damoder Reddy, and entitled Fair Market Value of Opsys US Corporation, dated August 2002. At p. OPS 01950 of Exhibit K, the Grant Thornton consultants state:

Based on the foregoing and applying the above-noted weightings, it is our opinion that the fair market value of a 100% ownership interest in the shareholders' equity of Opsys US, as of June 30, 2002, is \$108,000, rounded.

While the stated context of this report was in part for tax purposes, other contemporaneous documents such as November 11, 2002 board minutes of Opsys Limited, the subject of testimony by Mr. Zervoglos at deposition (also attached as part of Exhibit K), confirmed that the Opsys US entity had "negligible" value. Exhibit K and the board minutes were produced by defendant Opsys Limited in this action.

16. I was present for the testimony of Mr. Zervoglos on March 2, 2007 in this action. The Court will recall, I believe, that he testified that "Opsys US" had since 2001 been separated from Opsys Limited. Because the jury determined that the lease liability here was a

liability of Opsys Limited, not Opsys US, Mr. Zervoglos' testimony and the admissions that the US operation had negligible value are relevant, I believe, to rebutting any assertion by defendants now that Cambridge did not acquire all of the contracting party's (Opsys Limited) stock or asset value.

17. Attached hereto as **Exhibit L** are true copies of excerpts of the deposition testimony of plaintiff's consultant Paul Ainslie, and Opsys Limited's consultant Terry Lloyd, which describe the accounting treatment values for the acquisition of Opsys Limited and CDT Oxford Limited by Cambridge. I have highlighted certain relevant testimony.

18. Attached hereto as **Exhibit M** is a true copy of the audited Opsys Limited financial statements for the period ending September 30, 2002, the month prior to the Cambridge Transaction Agreement (Exh. A hereto). The debts of Opsys Limited existing at that time are identified at pp. 17-18 (OPS 07508-9) of Exh. J, and total £5.286 million (convertible debt) and £12.024 million (short-term debt), not including the \$4.85 million the jury has awarded plaintiff in this action. Opsys Limited's expert Mr. Lloyd interpreted Exhibit M at his deposition (attached as part of Exhibit L, Lloyd depo., pp. 101-102), and Exhibit M was produced to plaintiff by Opsys Limited.

19. I have been lead counsel for plaintiff since we substituted into this case in fall 2005. Throughout that entire time, I have been informed that Cambridge has directed the litigation for the defense. In particular, Cambridge participants have attended mediation, my client has met with Cambridge officers for such purposes in England, and the client representative for the defense at trial, Mr. Andrew Fields, who was present for the entire trial, is a lawyer with Cambridge. **Exhibit N**, from Cambridge's website, confirms Mr. Fields's position for Cambridge. I have frequently been advised that direction for defense of this action comes from Cambridge, and I have not heard that Opsys Limited or its former shareholders have directed the defense. We also have been advised that Opsys Limited records are on a server in the custody of Cambridge, although apparently some of the Opsys Limited documents used in the case have come from individual former employees. This has been hard-fought, expensive litigation, in which Cambridge

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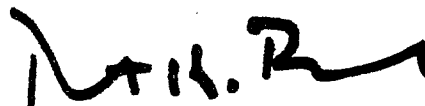
1 on behalf of Opsys Limited made every effort and engaged in every due procedure to defend and
2 contest plaintiff's breach of contract claim.

3 20. My office, at my direction, has searched publicly-available patent records,
4 and attached hereto as **Exhibit O** is a listing of patents applied for or in the name of "CDT Oxford
5 Limited," the company which was 84% owned by the judgment debtor at the time of initiation of
6 this action in December 2004, and which was, I believe, transferred to Cambridge's direct
7 ownership sometime in 2005 during the pendency of this case, as explained in the accompanying
8 Declaration of Paul Ainslie.

9 21. Attached hereto as **Exhibit P** are true copies of pages of the deposition
10 testimony of Messrs. Holmes and Zervoglos, confirming that the financial controller of Opsys
11 Limited became a director of Opsys UK, later CDT Oxford Limited, and that Mr. Holmes became
12 an observer director on the Cambridge board.

13 22. Finally, as to the attorney's fees motion, as the managing shareholder of the
14 BartkoZankel firm, I attest that the statements made in Ms. Huber's declaration regarding the
15 normative rates of our firm in the San Francisco legal market are accurate. I cause surveys
16 annually to be conducted so that our hourly rates are at the level of our peers and generally lower
17 than the rates of larger San Francisco firms against whom we frequently litigate. I know, as the
18 lawyer in charge who sends and collects the bills for this hourly engagement, that Sunnyside has
19 incurred the fees and costs prayed for by this motion, which I have always endeavored to keep as
20 low as possible for the client, and I know that we prepared and tried this case as efficiently as
21 possible given the dogged opposition.

22 I declare under penalty of perjury under the laws of the state of California that the
23 foregoing is true and correct and that this Declaration was executed April 2, 2007 at San Francisco,
24 California.



ROBERT H. BUNZEL

RJN 150

Company Registration No 3426174

OPSYS LIMITED

Report and Financial Statements

30 September 2002

Deloitte & Touche LLP
London



RJN 151

OPS 07490

OPSYS LIMITED

REPORT AND FINANCIAL STATEMENTS 2002

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OPS 07491

OPSYS LIMITED**REPORT AND FINANCIAL STATEMENTS 2002****OFFICERS AND PROFESSIONAL ADVISERS****DIRECTORS**

Sir John Fairclough	Chairman (resigned 26 April 2003)
John Baits	Vice Chairman (resigned 28 April 2003)
Michael Holmes	Chief Executive Officer
Alexis Zervoglos	Chief Financial Officer
Andrew Holmes	Non-Executive Director
Peter Johnson	Non-Executive Director
David Martin	Non-Executive Director (resigned 25 April 2003)
Andreas Zombanakis	Non-Executive Director (resigned 31 January 2002)
Paul Brunet	Non-Executive Director (resigned 1 May 2003)

SECRETARY

Ovalsec Limited
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Bristol
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Oxford OX2 0JX

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AUDITORS

Deloitte & Touche LLP
Chartered Accountants
London

RJN 153

OPS 07492

OPSYS LIMITED**DIRECTORS' REPORT**

The directors present their annual report and the audited financial statements for the year ended 30 September 2002.

PRINCIPAL ACTIVITIES AND REVIEW OF THE BUSINESS

October 2002 saw the transfer of management control of Opsys' principal centre of activities in Oxford, UK to CDT, a competitor, in a transaction by which Opsys received \$5 million in cash and an option for its shareholders to sell its shares to CDT when CDT is sold or lists, providing Opsys can demonstrate that it is free of other substantial liabilities.

In early 2002, after an extremely taxing year of fundraising in difficult markets, Opsys had secured adequate deals with large corporates to assure, at the very least, the medium-term prospects of the company, and the continued development of its exciting light-emitting dendrimer technology. As well as the transaction with Toppan announced in the accounts for 2001, management had fully drafted cash-generative transactions with two major US chemicals companies.

However, while pleased at the enthusiasm that all these large companies had shown for Opsys' technology and vision, management was concerned that the deals compromised the Company's intellectual property in a way which would make it difficult to achieve an attractive exit for shareholders in the long-term. While bringing in much needed cash and furthering the development of the technology, each deal would essentially have also made the Company a less tractable object for a potential buyer to swallow. Management therefore decided that selling to CDT and the consequent consolidation of intellectual property constituted a better approach to long-term value creation than striking further dilutive deals with corporates. CDT has an excellent portfolio of intellectual property relating to light-emitting polymers, an important class of OLED materials which share many of the same processing characteristics as Opsys' light-emitting dendrimers, and are likely to be licenseable to the same set of licensees. It is backed by strong financial institutions based in New York, and has signed license arrangements with Osram, Philips, DuPont and Seiko Epson, among others.

Opsys enjoys the right to appoint an observer to the Board of CDT, and has appointed Michael Holmes to represent it in this capacity until further notice.

As part of the transaction, the Opsys shareholders are also to establish a joint venture with CDT to exploit non-display applications of dendrimer technology. Opsys shareholders will own 60% of this venture, which will be called Arboresecent. Although plans are embryonic, Opsys management believes that this is an exciting opportunity, which could return further value to Opsys shareholders in the long term. The Company has already won a Scottish Executive SMART award to pursue opportunities in the area of printable electronics.

Management was always aware that the sale of Opsys' UK operation to CDT would make funding the Company's US operation a great challenge, and so it proved. After very nearly raising capital to fund the operation as an independent spin-out company, management was forced to put the company into liquidation in May 2003. The liquidation process has proceeded largely smoothly, with all assets and Opsys US intellectual property transferred to Global Tech Appliances, Inc., as anticipated by various financing transactions completed before the liquidation.

Opsys Limited's role, therefore, is now restricted to representing the interests of its shareholders with regard to CDT, and managing out the various liabilities with which the Company is now left, the biggest of which is a \$2m liability to Kodak. Although the Company retains no staff and is making no payments for work conducted, the remaining directors continue to work on behalf of the shareholders on these tasks.

RESULTS AND DIVIDENDS

The results for the year are set out on page 8. The directors are not proposing a dividend (2001: £ nil).

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OPSYS LIMITED

DIRECTORS' REPORT

DIRECTORS' SHARE INTERESTS

	2002				2001			
	Ordinary number	A number	B number	C number	Ordinary number	A number	B number	C number
J Fairclough	400	-	-	-	400	-	-	-
J Baits	-	-	10,000	-	-	-	10,000	-
M Holmes	1,005	2,651	600,000	72,187	1,000	-	600,000	66,660
A Zervoglos	1,060	34900	1,000,000	156,113	1,000	-	1,000,000	83,330
P Johnson	405	3,092	168,640	6,449	400	-	138,890	-
A Zombanakis	540	99,870	160,280	-	540	99,870	160,280	-
P Brunet	61	35,342	214,450	73,703	-	-	44,450	-

Aggregate emoluments disclosed do not include amounts for the value of options to acquire Ordinary 'B' shares in the Company granted to or held by directors. Information regarding directors' emoluments can be seen at note 3.

DIRECTORS' SHARE OPTIONS

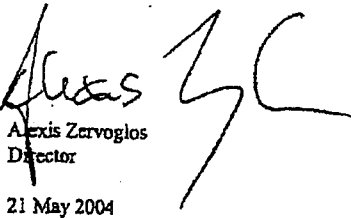
Name of director	Options held at 1 October 2001	Granted during the year	Exercised during the year	Cost of option £	Exercise price £	Options held at 30 September 2002	Date from which exercisable	Expiry date
M Holmes	15,560	-	-	-	0.45	15,560	3 December 1998	3 December 2008
M Holmes	20,000	-	-	-	1.00	20,000	10 January 2000	10 January 2010
M Holmes	-	1,165,661	-	-	0.92	1,165,661	5 June 2002	5 June 2012
P Johnson	25,000	-	-	-	0.45	25,000	3 December 1998	3 December 2008
P Johnson	25,000	-	-	-	0.18	25,000	20 May 1998	20 May 2008
P Johnson	83,330	-	-	0.12	0.18	83,330	1 January 1999	1 January 2009
P Johnson	40,000	-	-	-	1.00	40,000	10 January 2000	10 January 2010
A Zervoglos	25,000	152,250	-	-	0.92	152,250	5 June 2002	5 June 2012
A Zervoglos	40,000	-	-	-	0.45	25,000	3 December 1998	3 December 2008
A Zervoglos	-	792,649	-	-	1.00	40,000	10 January 2000	10 January 2010
A Zombanakis	20,000	-	-	-	0.92	792,649	5 June 2002	5 June 2012
A Zombanakis	25,000	-	-	-	0.45	20,000	3 December 1998	3 December 2008
A Zombanakis	83,330	-	-	-	0.18	25,000	20 May 1998	20 May 2008
A Zombanakis	40,000	-	-	0.12	0.18	83,330	1 January 1999	1 January 2009
A Zombanakis	-	100,000	-	-	1.00	40,000	10 January 2000	10 January 2010
J Fairclough	400,000	-	-	-	0.92	100,000	5 June 2002	5 June 2012
Total	953,690	2,443,692	-	-	0.45	400,000	3 December 1998	3 December 2008
						3,397,382		

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OPSYS LIMITED**DIRECTORS' REPORT****AUDITORS**

On 1 August 2003, Deloitte & Touche, the Company's auditors transferred their business to Deloitte & Touche LLP, a limited liability partnership incorporated under the Limited Liability Partnerships Act 2000. The Company's consent has been given to treating the appointment of Deloitte & Touche as extending to Deloitte & Touche LLP with effect from 1 August 2003 under the provisions of section 26(5) of the Companies Act 1989. A resolution to re-appoint Deloitte & Touche LLP as the Company's auditor will be proposed at the forthcoming Annual General Meeting.

Approved by the Board of Directors
and signed on behalf of the Board


Alexis Zervogios
Director
21 May 2004

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OPSYS LIMITED**STATEMENT OF DIRECTORS' RESPONSIBILITIES**

United Kingdom company law requires the directors to prepare financial statements for each financial year which give a true and fair view of the state of affairs of the company as at the end of the financial year and of the profit or loss of the company for that period. In preparing those financial statements, the directors are required to:

- select suitable accounting policies and then apply them consistently;
- make judgements and estimates that are reasonable and prudent;
- state whether applicable accounting standards have been followed; and
- prepare the financial statements on the going concern basis unless it is inappropriate to presume that the company will continue in business.

The directors are responsible for keeping proper accounting records which disclose with reasonable accuracy at any time the financial position of the company and to enable them to ensure that the financial statements comply with the Companies Act 1985. They are also responsible for the system of internal control, safeguarding the assets of the company and hence for taking reasonable steps for the prevention and detection of fraud and other irregularities.

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INDEPENDENT AUDITORS' REPORT TO THE MEMBERS OF OPSYS LIMITED

We have audited the financial statements of Opsys Limited for the year ended 30 September 2002 which comprise the profit and loss account, balance sheet, and the related notes 1 to 19. These financial statements have been prepared under the accounting policies set out therein.

This report is made solely to the company's members, as a body, in accordance with section 235 of the Companies Act 1985. Our audit work has been undertaken so that we might state to the company's members those matters we are required to state to them in an auditors' report and for no other purpose. To the fullest extent permitted by law, we do not accept or assume responsibility to anyone other than the company and the company's members as a body, for our audit work, for this report, or for the opinions we have formed.

Respective responsibilities of directors and auditors

As described in the statement of directors' responsibilities, the company's directors are responsible for the preparation of the financial statements in accordance with applicable United Kingdom law and accounting standards. Our responsibility is to audit the financial statements in accordance with relevant United Kingdom legal and regulatory requirements and auditing standards.

We report to you our opinion as to whether the financial statements give a true and fair view and are properly prepared in accordance with the Companies Act 1985. We also report if, in our opinion, the directors' report is not consistent with the financial statements, if the company has not kept proper accounting records, if we have not received all the information and explanations we require for our audit, or if information specified by law regarding directors' remuneration and transactions with the company is not disclosed.

We read the directors' report for the above year and consider the implications for our report if we become aware of any apparent misstatements.

Basis of opinion

We conducted our audit in accordance with United Kingdom auditing standards issued by the Auditing Practices Board. An audit includes examination, on a test basis, of evidence relevant to the amounts and disclosures in the financial statements. It also includes an assessment of the significant estimates and judgements made by the directors in the preparation of the financial statements and of whether the accounting policies are appropriate to the company's circumstances, consistently applied and adequately disclosed.

We planned and performed our audit so as to obtain all the information and explanations which we considered necessary in order to provide us with sufficient evidence to give reasonable assurance that the financial statements are free from material misstatement, whether caused by fraud or other irregularity or error. In forming our opinion, we also evaluated the overall adequacy of the presentation of information in the financial statements.

Going concern

In forming our opinion, we have considered the adequacy of the disclosure made in Note 1 to the financial statements concerning the uncertainties as to the Company obtaining further funding and the continued agreement of the Company's principal creditors to extend the due date of the Company's liabilities. In view of the significance of these uncertainties we consider that it should be drawn to your attention but our opinion is not qualified in this respect.

RJN 158

INDEPENDENT AUDITORS' REPORT TO THE MEMBERS OF OPSYS LIMITED

Opinion

In our opinion the financial statements give a true and fair view of the state of the company's affairs as at 30 September 2002 and of its loss for the year then ended and have been properly prepared in accordance with the Companies Act 1985.

Deloitte & Touche LLP

Deloitte & Touche LLP
Chartered Accountants and Registered Auditors
London

21 May 2004

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OPSYS LIMITED**PROFIT AND LOSS ACCOUNT**
Year ended 30 September 2002

	Note	2002 £	2001 £
TURNOVER		131,581	250
ADMINISTRATIVE EXPENSES			
Research expenses		(2,241,440)	(1,730,472)
Other administrative expenses		(2,240,891)	(2,454,896)
Amounts written off investments	9	(4,955,169)	(2,135,946)
Amounts written off licences	7	(2,861,434)	-
Loss on impairment of fixed assets	8	(779,659)	(4,088,964)
		<u>(13,078,593)</u>	<u>(10,410,278)</u>
OPERATING LOSS	2	(12,947,012)	(10,410,028)
Interest receivable		17,618	56,745
Interest payable and similar charges	6	(7,230,932)	(160,650)
RETAINED LOSS ON ORDINARY ACTIVITIES BEFORE TAXATION		(20,160,326)	(10,513,933)
Tax credit on loss on ordinary activities	4	434,463	377,401
LOSS FOR THE FINANCIAL YEAR		<u>(19,725,863)</u>	<u>(10,136,532)</u>
Retained loss brought forward	15	(13,416,748)	(3,280,216)
Retained loss carried forward	15	<u>(33,142,611)</u>	<u>(13,416,748)</u>

See note 19 to the accounts for details of significant post balance sheet events including the sale of the Company's operations.

There are no recognised gains or losses other than the loss for the year.

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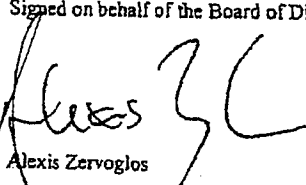
OPSYS LIMITED

BALANCE SHEET
30 September 2002

	Note	2002 £	2001 £
FIXED ASSETS			
Development costs, patents and trademarks	7	-	2,861,434
Tangible assets	8	766,071	933,812
Investments	9	2	2
		<u>766,073</u>	<u>3,795,248</u>
CURRENT ASSETS			
Debtors			
Due within one year	10	610,544	839,769
Due after one year	10	13,200	220,239
Cash at bank and in hand		454,663	1,466,491
		<u>1,078,407</u>	<u>2,526,499</u>
CREDITORS: amounts falling due within one year			
Convertible debt	11	(5,286,538)	(1,361,819)
Other creditors	11	(12,024,324)	(2,971,016)
		<u>(17,310,862)</u>	<u>(4,332,835)</u>
NET CURRENT LIABILITIES			
		<u>(16,232,455)</u>	<u>(1,806,336)</u>
TOTAL ASSETS LESS CURRENT LIABILITIES			
		<u>(15,466,382)</u>	<u>1,988,912</u>
CREDITORS: amounts falling due after more than one year			
	12	(198,185)	(418,269)
NET ASSETS			
		<u>(15,664,567)</u>	<u>1,570,643</u>
CAPITAL AND RESERVES			
Called up share capital	14	25,271	18,070
Share premium account	15	17,432,779	14,949,327
Share options reserve	15	19,994	19,994
Profit and loss account	15	(33,142,611)	(13,416,748)
EQUITY SHAREHOLDERS' FUNDS			
	17	<u>(15,664,567)</u>	<u>1,570,643</u>

These financial statements were approved by the Board of Directors on 21 May 2004.

Signed on behalf of the Board of Directors


Alexis Zervoglos

Chief Financial Officer

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OPSYS LIMITED**NOTES TO THE ACCOUNTS****Year ended 30 September 2002****1. ACCOUNTING POLICIES**

The financial statements are prepared in accordance with applicable accounting standards. The particular accounting policies adopted by the directors are described below. The requirements of FRS 19 (Deferred Taxation) were adopted during the current year and prior year comparative figures have not been restated as there was no material effect. With the exception of FRS 19, all other accounting policies were applied consistently.

Basis of accounting

The financial statements are prepared under the historical cost convention and in accordance with applicable accounting standards. The Company has taken advantage of the exemption in s248 of the Companies Act 1985 not to prepare group accounts on the basis that it qualifies as a medium sized group under the Act. Therefore the financial information contained in these financial statements relates to the individual Company and not its group.

Going concern

As stated in the Directors' report and in note 19, the company has relinquished control of its UK operation to CDT and liquidated its US operation. With respect to the closure of the US operation, there has been no impact on the company other than a potential employment dispute with the erstwhile manager of that operation. Although the Directors do not believe there to be any merit whatsoever in any claim brought by this former employee, in any case they estimate that the maximum liability for this claim to be \$250,000.

The company essentially remains now as a holding company managing its stake in CDT. To that end, its operating expenses are greatly reduced and consist of the costs associated with its observer status on the CDT Board and of fulfilling other responsibilities such as audit requirements.

This low level of funding is currently being met by the company's shareholders and it is the intention of the directors to secure sufficient funding for at least a period of twelve months from the date of these accounts, as they have already done in the preceding months since the liquidation of the US operation.

With regard to the Company's existing creditors, the Company intends to repay them at such time as its stake in CDT (as described in Note 19) becomes liquid. It secured agreement from over 99% (by value) of its creditors to this position and is in discussions with the balance. Notable among its creditors is Eastman Kodak Company ("Kodak") which accounts for over 90% of the outstanding creditor balance. The Company has made arrangements with Kodak that the due date for this liability be formally extended for six months and Kodak has indicated to the Directors that it intends to extend this on a semi-annual basis until such time as the company's assets are liquid (although it is not legally bound to do so). The Kodak liability is secured against the company's assets.

The Directors believe that there is a reasonable certainty that they will be able to obtain appropriate funding and therefore have prepared the financial statements on a going concern basis. The going concern basis assumes that such funding will be available, the financial statements do not include any adjustments that may be necessary should the Company fail to obtain the necessary funding.

Investments

Fixed asset investments are shown at cost less provision for impairment.

Tangible fixed assets

Tangible fixed assets are stated at cost, net of depreciation and provision for impairment. Depreciation is provided on all tangible fixed assets at rates calculated to write off the cost or valuation, less estimated residual value, of each asset on a straight line basis over its expected useful life as follows:

Development costs, patents and trade marks	-	10 years
Computer equipment and software	-	3 years
Fixtures and fittings	-	5 years
Laboratory equipment	-	5 years
Motor vehicles	-	4 years

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OPSYS LIMITED**NOTES TO THE ACCOUNTS**
Year ended 30 September 2002**1. ACCOUNTING POLICIES (CONTINUED)****Turnover**

Turnover represents the amount receivable in the normal course of business and is stated net of VAT.

Pension costs

The amount charged to the profit and loss account in respect of pension costs for defined contribution schemes is the contributions payable in the year. Any difference between contributions payable in the year and contributions actually paid are shown as either accruals or prepayments in the balance sheet.

Foreign currency

Transactions in foreign currencies are recorded at the rate of exchange at the date of the transaction. Monetary assets and liabilities denominated in foreign currencies at the balance sheet date are reported at the rates of exchange prevailing at that date or, if appropriate, at the forward contract rate. All exchange differences are included in the profit and loss account.

Research expenses

Research expenditure is written off as it is incurred.

Cash flow

The Company has taken advantage of the exemption allowed under FRS 1 (revised) and has not produced a cashflow statement on the basis that it qualifies as a medium sized group.

Leases

Assets held under hire purchase transactions, which confer rights and obligations similar to those attached to owned assets, are capitalised as tangible fixed assets and are depreciated over their useful lives. The capital elements of future hire purchase obligations are recorded as liabilities, while the interest elements are charged to the profit and loss account over the period of the leases to produce a constant rate of charge on the balance of capital repayments outstanding.

Rentals under operating leases are charged on a straight-line basis over the lease term, even if the payments are not made on such a basis. Benefits received and receivable as an incentive to sign an operating lease are similarly spread on a straight-line basis over the lease term, except where the period to the review date on which the rent is first expected to be adjusted to the prevailing market rate is shorter than the full lease term, in which case the shorter period is used.

Debt

Debt is initially stated at the amount of the net proceeds after deduction of issue costs. The carrying amount is increased by the finance cost in respect of the accounting period and reduced by payments made in the period. Convertible debt is reported as a liability until conversion actually occurs. No gain or loss is recognised on conversion.

Taxation

Current tax, including UK corporation tax, is provided at amounts expected to be paid or recovered using the tax rates and laws that had been enacted or substantially enacted by the balance sheet date.

Patents and trade marks

Patents, licences and trademarks are included at cost and depreciated in equal annual instalments over a period of 10 years, which is their estimated useful economic life. Provision is made for any impairment.

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OPSYS LIMITED**NOTES TO THE ACCOUNTS****Year ended 30 September 2002****2. OPERATING LOSS**

Operating loss is stated after charging:

	2002 £	2001 £
Depreciation:		
Of owned assets		
Assets held under hire purchase contracts	127,343	50,217
Operating lease rentals – property	178,841	178,831
Auditors remuneration for audit services	52,800	52,800
	44,000	45,000
And after crediting:		
Foreign exchange gain	194,285	60,044

3. DIRECTORS' REMUNERATION

The remuneration of the directors was as follows:

	2002 £	2001 £
Directors' fees		
Fees paid to third parties in respect of directors' services	240,734	222,807
	5,099	12,398

Two (2001 - two) directors are members of money purchase pension schemes. Aggregate contributions paid by the Company in respect of such directors were £7,750 (2001 - £6,760). Details of director's shareholdings and options are shown in the Directors' Report.

The highest paid director received a salary of £80,000 (2001 - 75,000). The company paid contributions to money pension schemes, in respect of the highest paid director of £4,000 (2002 - £3,750).

4. TAXATION

No corporation tax liability has been accrued due to the Company's losses both in the current and previous year.

The Company has claimed R&D tax credit repayments of £434,463 for the year ending 30 September 2002 (2001: £377,401).

The Company has not recognised a deferred tax asset in respect of losses of approximately £9 million due to a lack of certainty regarding future profitability.

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OPSYS LIMITED

NOTES TO THE ACCOUNTS
Year ended 30 September 2002

4. TAXATION (CONTINUED)

The standard rate of current tax for the year, based on the UK standard rate of corporation tax is 30% (2001 – 30%). The current tax credit for the year is 2.1% (2001 – 3.6%) for the reasons set out in the following reconciliation:

	2002 £	2001 £
Loss on ordinary activities before tax	(20,160,326)	(10,513,933)
Tax at 30%	(6,048,098)	(3,154,180)
Expenses not deductible for tax purposes	5,441,054	2,342,238
Capital allowances	(44,912)	(69,953)
Losses not utilised	651,956	881,896
Research & development tax credit	(434,463)	(377,401)
	<u>(434,463)</u>	<u>(377,401)</u>

5. EMPLOYEES

Employment costs

	2002 £	2001 £
Employee costs (including executive directors) amounted to:		
Wages and salaries	1,408,507	939,781
Social security costs	137,397	90,604
Pension costs	41,165	27,934
	<u>1,587,069</u>	<u>1,058,319</u>

Number of employees

The average monthly number of employees (including executive directors) was 35 (2000: 30). All were employed in administrative (including research) capacities.

6. INTEREST PAYABLE AND SIMILAR CHARGES

	2002 £	2001 £
Premium Conversion	6,822,489	-
Bank loans and overdrafts	298,586	62,220
Finance charges	109,167	97,740
Other interest	690	690
	<u>7,230,932</u>	<u>160,650</u>

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OPSYS LIMITED**NOTES TO THE ACCOUNTS**
Year ended 30 September 2002**7. DEVELOPMENT COSTS, PATENTS AND TRADE MARKS**

	Patents and trade marks £	Total £
Cost		
1 October 2001		
Additions	3,012,036	3,012,036
30 September 2002	3,012,036	3,012,036
Depreciation		
1 October 2001		
Written off	150,602	150,602
30 September 2002	2,861,434	2,861,434
30 September 2002	3,012,036	3,012,036
Net book value		
30 September 2002		
30 September 2001	2,861,434	2,861,434

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OPSYS LIMITED

NOTES TO THE ACCOUNTS
Year ended 30 September 2002

8. TANGIBLE FIXED ASSETS

	Motor vehicle £	Computer Equipment £	Labora- tory equipment £	Fixtures and fittings £	Assets in the course of construction £	Total £
Cost						
1 October 2001	13,950	161,271	1,073,370	53,184	4,088,964	5,390,739
Additions	-	9,182	149,747	2,210	779,659	940,798
Disposals	-	(34,249)	-	-	(4,047,764)	(4,082,013)
30 September 2002	13,950	136,204	1,223,117	55,394	820,859	2,249,524
Depreciation						
1 October 2001	6,631	48,338	297,560	15,434	4,088,964	4,456,927
Charge for year	3,488	50,967	240,163	11,566	-	306,184
Disposal	-	(11,553)	-	-	(4,047,764)	(4,059,317)
Impairment loss	-	-	-	-	779,659	779,659
30 September 2002	10,119	87,752	537,723	27,000	820,859	1,483,453
Net book value 30 September 2002	3,831	48,452	685,394	28,394	-	766,071
30 September 2001	7,319	112,933	775,810	37,750	-	933,812

The motor vehicle, a proportion of the computer equipment, laboratory equipment and fixture and fittings are held under a hire purchase contract.

A provision has been made for the impairment of 'Assets in the course of construction' under FRS 11 (Impairment of Fixed Assets and Goodwill) reflecting the current inability of Opsys Limited to realise value from these assets.

Leased assets included above:

	Motor vehicle £	Computer equipment £	Labora- tory equipment £	Fixtures and fittings £	Assets in the course of construction £	Total £
Net book value 30 September 2002	3,831	14,237	384,809	-	-	402,877
30 September 2001	7,319	30,140	543,779	-	-	581,238

See note 19 for details of significant post balance sheet events including the sale of the Company's operations and assets.

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OPSYS LIMITED**NOTES TO THE ACCOUNTS**
Year ended 30 September 2002**9. INVESTMENT**

	Opsys 2 Corp		Opsys US Corp		Total
	Equity	Loans	Equity	Loans	
	£	£	£	£	£
Cost					
At 1 October 2001	1,187,986	129,603	68	818,291	2,135,948
Additions	-	-	-	4,955,169	4,955,169
At 30 September 2002	<u>1,187,986</u>	<u>129,603</u>	<u>68</u>	<u>5,773,460</u>	<u>7,091,117</u>
Amounts written off					
At 1 October 2001	1,187,985	129,603	67	818,291	2,135,946
Impairment losses	-	-	-	4,955,169	4,955,169
At 30 September 2002	<u>1,187,985</u>	<u>129,603</u>	<u>67</u>	<u>5,773,460</u>	<u>7,091,115</u>
Net Book Value					
At 30 September 2002	<u>1</u>	<u>-</u>	<u>1</u>	<u>-</u>	<u>2</u>
At 30 September 2001	<u>1</u>	<u>-</u>	<u>1</u>	<u>-</u>	<u>2</u>

The directors continue to believe that the investment and amounts owed by its subsidiaries are impaired and thus have been written off in accordance with FRS 11.

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OPSYS LIMITED**NOTES TO THE ACCOUNTS**
Year ended 30 September 2002**10. DEBTORS**

Amounts falling due within one year:

	2002 £	2001 £
Amounts owed by subsidiary undertakings	-	-
Corporation tax	435,163	377,401
VAT	33,967	115,841
Other debtors	35,718	166,649
Prepayments and accrued income	105,696	67,882
Shares to be issued	-	111,996
	<u>610,544</u>	<u>839,769</u>

Amounts falling due after one year:

	2002 £	2001 £
Other debtors	13,200	220,239
	<u>13,200</u>	<u>220,239</u>

11. CREDITORS: AMOUNTS FALLING DUE WITHIN ONE YEAR

	2002 £	2001 £
Convertible debt	5,286,538	1,361,819
	<u>5,286,538</u>	<u>1,361,819</u>

In September 2001, Opsys Limited raised from its institutional investors £1,400,000 in the form of a convertible loan. This debt is shown above after deduction of issue costs. The loan, a 20% premium and a monthly interest rate of 1.5% was repayable prior to 31 May 2002.

During November 2001, Opsys Limited raised further funds through a two financial instruments – a share issue combined with a zero interest loan and a convertible loan. Through the former instrument Opsys Limited issued 3,062,125 shares at £0.10 per share combined with a loan of £414,288. The convertible loan raised £1,584,000 and has a conversion premium of 200%.

During April 2002, Opsys Limited again raised funds through two financial instruments – a share issue combined with a zero interest loan and a convertible loan. Through the former instrument Opsys Limited issued 1,317,500 shares at £0.10 per share combined with a loan of £178,250. The convertible loan raised £1,710,000 and has a conversion premium of 200%.

In the event of an investment in new ordinary shares, the repayable sum may, in part or total, be converted through a share subscription at the same price per share as the investors subscribe in new ordinary shares.

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OPSYS LIMITED

NOTES TO THE ACCOUNTS

Year ended 30 September 2002

11. CREDITORS: AMOUNTS FALLING DUE WITHIN ONE YEAR (CONTINUED)

Other creditors:

	2002 £	2001 £
Loans and accrued interest	8,577,851	-
Obligations under hire purchase contracts	220,085	181,263
Trade creditors	1,664,602	886,845
Amounts owed to subsidiary undertakings	-	12,124
Other taxation & social security	52,735	35,960
Other creditors	1,282,274	1,404,693
Accruals	226,777	450,131
	<u>12,024,324</u>	<u>2,971,016</u>

The Company has granted a fixed and floating charge on its assets to secure its loans.

12. CREDITORS: AMOUNTS FALLING DUE AFTER MORE THAN ONE YEAR

	2002 £	2001 £
Obligations under hire purchase contracts	198,185	418,269
	<u>198,185</u>	<u>418,269</u>

13. HIRE PURCHASE CONTRACTS

Liabilities under hire purchase contracts are repayable as follows:

	2002 £	2001 £
Within one year	220,085	181,263
Between two and five years	198,185	418,269
	<u>418,270</u>	<u>599,532</u>

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OPSYS LIMITED

NOTES TO THE ACCOUNTS
Year ended 30 September 2002

14. SHARE CAPITAL

	2002 £	2001 £
Authorised:		
16,620 Ordinary shares of 0.1p each (2001: 38,950)	17	39
4,887,274 Ordinary 'A' shares of 0.1p each (2001: 4,981,820)	4,887	4,982
17,649,514 Ordinary 'B' shares of 0.1p each (2001: 13,956,230)	17,649	13,956
7,968,854 Ordinary 'C' shares of 0.1p each (2001: 20,100,000)	7,969	20,100
15,214,776 Ordinary 'D' shares of 0.1p each (2001: Nil)	15,215	-
4,702,712 Ordinary 'D-UK' shares of 0.1p each (2001: Nil)	4,703	-
	<u>50,440</u>	<u>39,077</u>
Called up, allotted and fully paid		
16,620 Ordinary shares of 0.1p each (2001: 16,620)	17	17
4,459,420 Ordinary 'A' shares of 0.1p each (2001: 4,459,420)	4,459	4,459
11,373,425 Ordinary 'B' shares of 0.1p each (2001: 6,993,800)	11,373	6,994
6,599,990 Ordinary 'C' shares of 0.1p each (2001: 6,599,990)	6,600	6,600
2,821,622 Ordinary 'D-UK' shares of 0.1p each (2001: Nil)	2,822	-
	<u>25,271</u>	<u>18,070</u>

In April 2001, Opsys Limited issued 704,751 shares for £12.00 per share. In July 2001, there was a 10:1 share split for all classes of shares.

The rights attached to Ordinary 'A', Ordinary 'B', Ordinary 'C' and Ordinary shares are as follows:

- all shares have the right to attend, speak and vote at any General meeting of the Company;
- any dividend declared by the Company shall be paid on all Shares in issue pari passu as if they were all Shares of the same class;
- in the event of a sale or winding up, the proceeds shall be distributed as follows – firstly, Ordinary 'C' shares shall receive £1.80 per share, secondly, Ordinary 'A' shares shall receive £1.00 per share, thirdly, Ordinary and Ordinary 'B' shares shall receive £1.00 per share in proportion to the shares held, fourthly Ordinary 'A', Ordinary 'B' and Ordinary shares shall receive £0.80 per share in proportion to the shares held and the balance shall be distributed amongst all shares in proportion to the shares held;
- if immediately prior to a listing, the value per share is less than £1.80 then a capital reorganisation shall take place to ensure that in the following priority - firstly, Ordinary 'C' shareholders shall receive the equivalent of £1.80 per share, secondly, Ordinary 'A' shareholders shall receive the equivalent of £1.00 per share, thirdly, Ordinary and Ordinary 'B' shareholders shall receive the equivalent of £1.00 per share in proportion to the shares held, and finally Ordinary 'A', Ordinary 'B' and Ordinary shareholders shall receive the remainder of the shares in proportion to the shares held.

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OPSYS LIMITED**NOTES TO THE ACCOUNTS****Year ended 30 September 2002****14 SHARE CAPITAL (CONTINUED)***Shares issued for cash*

Class of share allotted	2002		2001	
	Number	£	Number	£
Ordinary shares	-	-	3,130	3,756
Ordinary 'A' shares	-	-	-	-
Ordinary 'B' shares	4,379,625	437,962	423,560	508,272
Ordinary 'C' shares	-	-	6,599,990	7,919,988
Ordinary 'D-UK' shares	2,821,622	2,088,000	-	-
	<u>7,201,247</u>	<u>2,525,962</u>	<u>7,026,680</u>	<u>8,432,016</u>

During the financial year, Opsys Limited issued shares in conjunction with loans outlined in Note 11.

Furthermore, in July 2002, Toppan Printing Company Ltd ("Toppan") paid £2,088,000 for 2,821,622 Ordinary "D-UK" shares. These shares will form a new class ranking pari passu with other Ordinary shares with respect to voting rights but where the return (whether in the form of income or capital) on the investment made in the Company shall be derived solely from the Non-US Business.

Options have been granted under the unapproved share option scheme to subscribe for shares of the Company as follows:

Ordinary 'B' shares		
Number of shares under option	Subscription price per share	Exercise period
276,660	£0.18	Maximum of 10 years from date of granting
632,980	£0.45	Maximum of 10 years from date of granting
200,000	£1.00	Up to 1 December 2001
609,430	£1.00	Maximum of 10 years from date of granting
5,046,519	£0.92	Maximum of 10 years from date of granting

Ordinary shares		
Number of shares under option	Subscription price per share	Exercise period
500	£1.00	Up to 1 December 2001

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OPSYS LIMITED

NOTES TO THE ACCOUNTS
Year ended 30 September 2002

15 CAPITAL AND RESERVES

	Share capital £	Share premium account £	Share options reserve £	Profit & loss account £	Total £
At 1 October 2001	18,070	14,949,327	19,994	(13,416,748)	1,570,643
Share issues	7,201	2,518,761	-	-	2,525,962
Share issue costs	-	(35,309)	-	-	(35,309)
Retained loss for the year	-	-	-	(19,725,863)	(19,725,863)
At 30 September 2002	25,271	17,432,779	19,994	(33,142,611)	(15,664,567)

16 RELATED PARTY TRANSACTIONS

At the year-end Quester Capital Management held 4,714 Ordinary shares, 1,243,310 Ordinary 'A' shares, 255,220 Ordinary 'B' shares and 2,887,872 Ordinary 'C' shares in Opsys Limited. Andrew Holmes was appointed director of Opsys Limited on 12 January 2000. He also has a controlling interest in, and is the Managing Director of Quester Capital Management. During the year £536 (2001: £12,398) was paid to Quester Capital Management in respect of director's fees for Andrew Holmes' services during the year.

Peter Johnson, a director, charged fees for consultancy services of £ 4,563 (2001: £nil) during the financial year.

17 RECONCILIATION OF MOVEMENTS IN EQUITY SHAREHOLDERS' FUNDS

	2002 £	2001 £
Loss for the financial year	(19,725,863)	(10,136,532)
New shares issued	2,525,962	8,432,016
Share issue costs	(35,309)	(216,692)
Net addition to shareholders' funds	(17,235,210)	(1,921,208)
Opening shareholders' funds	1,570,643	3,491,851
Closing shareholders' funds	(15,664,567)	1,570,643

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OPSYS LIMITED**NOTES TO THE ACCOUNTS**
Year ended 30 September 2002**18 FINANCIAL COMMITMENTS**

Annual commitments under non-cancellable operating leases, in respect of land and buildings are as follows:

	2002	2001
	£	£
Expiry date		
- between two and five years	55,440	52,800
- after five years	76,805	73,148

In 2001, Opsys Limited entered into a lease contract, in respect of land and buildings, for and on behalf of its subsidiary Opsys US Corp. This expense is borne in the books of Opsys US Corp. The annual commitment increases by 5% on an annual basis for the duration of the lease. The lease expires on 30 April 2008.

In addition, Opsys Limited also entered into contracts, for and on behalf of Opsys US Corp, with respect to the acquisition of capital equipment for the pilot line in Fremont, California. The outstanding financial commitments with respect the capital equipment, as at the year-end, is £12,114,015. These commitments have been either fulfilled or contractually novated to Opsys US Corp after the year-end.

19 POST BALANCE SHEET EVENTS

As described in the Directors' Report, the company has relinquished control of all its operations since the balance sheet date and remains purely as a holding company for its resulting stake in CDT Acquisition Corp, the acquirer.

The series of transactions that led to this are as follows:

- i. On 24 October 2002, the entirety of the company's UK R&D operations, including associated contracts and staff, was hived down into a newly incorporated entity, Opsys UK Limited.
- ii. On 25 October 2002, Opsys Limited entered into a management agreement with CDT Limited under which CDT Limited undertook to manage and fund Opsys UK Limited going forward in return for a significant proportion of profits from that company. As part of this arrangement, it was agreed that Opsys UK Limited would be renamed CDT Oxford Limited.
- iii. Also on 25 October 2002, CDT Acquisition Corp and Opsys Limited entered into a series of complementary options under which CDT has the right to buy Opsys UK Limited and Opsys Limited has the right to sell either Opsys UK Limited or Opsys Limited. All three of these options are subject to a number of conditions.

The net upfront fee for entering into these transactions was a cash payment by CDT of \$5,000,000 and on eventual sale through the exercise of the options described in (iii) above, Opsys Limited or its shareholders will receive a significant number of shares in CDT Acquisition Corp, the holding company for the CDT group of companies.

In addition, on 22 November 2002, Opsys Limited sold Opsys US Corporation (until then a wholly owned subsidiary) to Opsys Holding Co 2 Limited, a newly incorporated independent company. The consideration for the sale was \$1 although Opsys Limited remained a \$2,000,000 creditor of Opsys US Corporation. The sale was carried out after an independent valuation by Grant Thornton in the US. Subsequently, after failing to secure funding, the US company was liquidated in May 2003 and the debt was written off in the company's accounts.

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EXHIBIT P

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7 Attorneys for Non-Party/Respondent
8 CAMBRIDGE DISPLAY TECHNOLOGY, INC.

9
10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 SAN FRANCISCO DIVISION

13
14 SUNNYSIDE DEVELOPMENT
COMPANY, LLC,

15
16 Plaintiff,

17 vs.

18 OPSYS LIMITED, a United Kingdom
Company,

19 Defendant.
20

No. C-05-00553 MHP

**DECLARATION OF MICHAEL
BLACK IN OPPOSITION TO
PLAINTIFF'S MOTION TO ADD
CAMBRIDGE DISPLAY
TECHNOLOGY, INC. AS A PARTY
TO ACTION AND JUDGMENT**

Date: May 16, 2007
Time: 1:00 p.m.
Courtroom: 15, 18th Floor
Judge: Hon. Marilyn Hall Patel

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RJN 175

1 1. I, MICHAEL BLACK, declare as follows:

2 2. I am the Chief Financial Officer for Cambridge Display Technology, Inc.
3 ("CDT Inc."). I have held this position since March 2007. From September 2004 to March
4 2007, I was the Vice President, Finance, for CDT Inc. I have also been Assistant Company
5 Secretary for CDT Inc. since March 2004. I have been Principal Financial Officer and
6 Principal Accounting Officer for CDT Inc. from July 2004 to September 2005 and from
7 July 2006 to the present. I have never been a director of CDT Inc.

8 3. From June 2002 to September 2004, I was the Financial Planning and
9 Analysis Manager for Cambridge Display Technology Limited (“CDT Ltd.”). I also have
10 held other positions with CDT Ltd. and have served as a director of CDT Ltd.

4. I am a member of the Board of Directors of Opsys Limited (“Opsys”). I have been a director of Opsys since December 2004. I have not held any other positions with Opsys. I did not hold any position with Opsys at the time of the “2002 Transaction” discussed below.

15 5. I have personal knowledge of the matters stated in this declaration and, if
16 called as a witness, could testify competently thereto.

17 6. I received a BA (Hons) in Management Studies from Selwyn College,
18 University of Cambridge. I am trained in accounting and am an associate of the Chartered
19 Institute of Management Accountants (1991 – present). As such, I have a broad knowledge
20 of tax law in the United Kingdom.

21 **The 2002 Transaction**

22 7. I am familiar with the structure of the “2002 Transaction” whereby CDT
23 Ltd. acquired control of the assets of Opsys UK Limited (“Opsys UK”). I also am familiar
24 with certain significant potential UK liabilities which were avoided by the structure of the
25 2002 Transaction.

26 8. CDT Inc. deemed tax considerations to be of importance in determining the
27 structure of the 2002 Transaction. For example, tax considerations were a major reason that
28 the 2002 Transaction was not structured as a sale of Opsys' UK assets for CDT Inc. stock.

1 If CDT Inc. had acquired all of Opsys' UK assets for CDT Inc. stock in 2002, then Opsys
2 would have been taxed on the value of such stock less the value of any tangible assets sold.
3 The patents developed by Opsys' UK operations had a very low "basis" for UK tax
4 purposes, even though very significant sums had been spent developing the underlying
5 technology and prosecuting the patents. If CDT Inc. had acquired these patents, therefore,
6 Opsys would have been taxed on substantially the entire value of the stock received from
7 CDT Inc. Because Opsys did not have cash on hand or other means to pay such tax, and
8 because CDT Inc.'s stock was then illiquid, such a tax would have been a significant barrier
9 to completing the transaction. It is my understanding, as CDT Inc.'s Chief Financial
10 Officer, that the transaction whereby CDT Ltd. acquired control of Opsys' UK assets was
11 structured to avoid such a result.

12 9. For the reasons described in the David Fyfe's declaration, CDT Inc. had no
13 interest in acquiring Opsys' US assets or liabilities. To the best of my knowledge and
14 belief, Opsys did not transfer any assets or liabilities of Opsys US Corporation ("Opsys
15 US") to Opsys UK. Specifically, Opsys did not transfer any intellectual property of Opsys
16 US to Opsys UK. This is entirely consistent with what CDT Inc. said in its final prospectus
17 of December 15, 2004 at page F-15, where it stated: "The terms of the Transaction
18 Agreement [meaning the 2002 Transaction] were entered into by the Company [meaning
19 CDT Inc. and its subsidiaries] so that it could gain control of and economic interest in the
20 UK assets and operations of Opsys (which had been transferred to Opsys UK immediately
21 prior to the transaction) in such a manner to avoid acquiring any interest in any other assets
22 or liabilities of Opsys." Bunzel Decl. (Dkt. 182) Ex. C at 119.

23 10. Mr. Ainslie, in his declaration dated March 30, 2007 and filed April 2, 2007
24 (Dkt. 180) ("Ainslie Decl."), suggests that the language quoted immediately above was
25 "unusual," and he speculates that "the purpose of the transaction may be inconsistent with
26 the interests of creditors of Opsys Limited." Ainslie Decl. ¶ 8. His speculation is entirely
27 wrong and reflects a fundamental misunderstanding of the situation. As explained above,
28 the structure of the 2002 Transaction reflected two principal purposes: a proper business

1 purpose of obtaining certain assets (Opsys' UK assets) but not other assets (Opsys' US
2 assets); and sound tax planning. There was no purpose to place Opsys' creditors at any
3 disadvantage. To the contrary, and as further explained in paragraphs 26 through 29 below,
4 steps were taken so that most of the consideration paid to Opsys and its shareholders would
5 be escrowed or placed in trust for the protection of Opsys' creditors, rather than simply be
6 transferred outright to Opsys' shareholders.

7 11. Sunnyside Development Company, LLC ("Plaintiff"), in its motion (Dkt.
8 179, at 11:17-12:9), and to a lesser extent Mr. Ainslie in his declaration (Dkt. 180, ¶ 7),
9 insinuate either (a) that CDT Inc. underpaid Opsys for its UK assets or (b) that CDT Inc.
10 moved the UK assets out of Opsys for the purpose of hindering Opsys' creditors. Neither
11 suggestion is correct.

12 (a) The insinuation that CDT Inc. underpaid Opsys for its UK assets is not only
13 wrong, it is circular. The value assigned to the transaction is the then (pre-IPO)
14 value ascribed to the consideration given by CDT Inc. in the transaction (mainly
15 stock but also \$5 million in cash). Mr. Ainslie concedes as much by noting that the
16 value was adjusted downward at December 2004 "due to changes in the value of
17 Cambridge [CDT Inc.] stock going to the Opsys Limited shareholders." Ainslie
18 Decl. ¶ 7. Besides, as reflected in CDT's Final Prospectus (Bunzel Decl. (Dkt. 182),
19 Ex. C, at 143), the price paid was not only **not** too low, it was vastly in excess of the
20 book value of the assets at the date of the transaction: the book value of the assets
21 was then \$602,000; the value of research and development then in process was
22 \$12,200,000; and fully \$14,092,000 of the price was deemed "goodwill," meaning
23 that the price paid was more than double the book value of that which was acquired.

24 (b) The insinuation that CDT Inc. moved assets out of Opsys for the purpose of
25 hindering Opsys' creditors is equally wrong, for the reasons stated in paragraph 10
26 above and for the reasons stated in Mr. Fyfe's declaration.

27 12. Attached hereto as **Exhibit A** is a true and correct copy of Opsys' Disclosure
28 Letter, dated October 23, 2002, and addressed to CDT Acquisition Corp. (the name, at that

1 time, of CDT Inc.). (From this document we have redacted part 2, section 25; part 3,
2 section 18; and item 29 of the Disclosure Bundle (because they contain trade secrets and
3 other commercially sensitive information) and part 2, section 30 (because they contain
4 individuals' salaries).) Opsys provided this Disclosure Letter to CDT Inc. pursuant to the
5 Transaction Agreement executed October 23, 2002, by CDT Inc., CDT Ltd., Opsys, Opsys
6 UK, Opsys US, Opsys 2 Corporation and the directors of Opsys (Alexis Zervoglos and
7 Michael Holmes) ("Transaction Agreement"), a true and correct copy of which is attached
8 as Exhibit A to the Bunzel Decl. filed April 2, 2007 (Dkt. 182).

9 13. In addition to the \$5 million cash that Opsys received under the Transaction
10 Agreement in 2002, CDT Inc. effectively forgave a \$900,000 loan that CDT Inc. had made
11 to Opsys earlier that year.

12 **Opsys UK (Later Renamed CDT Oxford) and Opsys Remain Separate Entities**

13 14. Opsys UK was renamed CDT Oxford Limited ("CDT Oxford") late in 2002.
14 Henceforth in this declaration I shall refer to this entity as CDT Oxford.

15 15. At all times after CDT Ltd. acquired control of CDT Oxford's operations,
16 CDT Oxford maintained employees, books of accounts, and bank accounts separate from
17 those of CDT Inc. and CDT Ltd. CDT Ltd., Opsys and CDT Oxford all have their own
18 audited accounts, as required by UK law. Each maintains its own share register. Each has
19 its own General Ledger. Each has its own board of directors.

20 16. Through December 2004, Opsys' Chief Executive Officer and Chief
21 Financial Officer were Michael Holmes and Alexis Zervoglos. Damoder Reddy was
22 employed as Chief Operating Officer by either Opsys or Opsys US. Which of these two
23 companies employed Mr. Reddy was the subject of a legal action that settled out of court.
24 None of these individuals has ever been an employee of CDT Inc. or CDT Ltd. None of
25 them has ever been a member of CDT Inc.'s Board of Directors.

26 17. None of the members of CDT Inc.'s Board of Directors has ever been a
27 member of the Board of Directors of Opsys, Opsys UK, or CDT Oxford.

28

1 18. Beginning in October 2002, CDT Inc. reported 100% of the net profit or loss
2 of CDT Oxford in accounts using a method similar to the equity method. This means that
3 CDT Oxford's net profit or loss was reported as an item of other income or expense.
4 Effective January 1, 2004, CDT Inc. was required as a matter of accounting to fully
5 consolidate CDT Oxford's results as part of CDT Inc.'s consolidated financial statements.
6 This was described in the Final Prospectus of CDT Inc. at F-33 and F-34 (Bunzel Decl.
7 (Dkt. 182) Ex. C at 142-43). Nevertheless, CDT Oxford continued to be a company that is
8 separate and distinct from both CDT Inc. and CDT Ltd. As noted above, CDT Oxford
9 observes the normal corporate formalities.

10 **The 2004 Transactions and the IPO of CDT Inc.**

11 19. After the 2002 Transaction, a dispute arose between Opsys and CDT Inc.
12 over whether the anti-dilution provisions of the Transaction Agreement had been triggered
13 by a financing entered into by CDT Inc. that resulted in the issuance of additional preferred
14 stock. Were the anti-dilution provisions of the Transaction Agreement triggered by this
15 financing, Opsys' shareholders would be entitled to more shares of CDT Inc.'s common
16 stock if certain put or call options provided for in the Transaction Agreement were
17 exercised. As stated in the Transaction Agreement, a number of events could cause such an
18 options exercise. Among the listed events that could lead to an options exercise was an
19 initial public offering ("IPO") by CDT Inc.

20 20. CDT Inc. did hope to go public. On July 30, 2004 CDT Inc. filed a
21 registration statement with the Securities and Exchange Commission.

22 21. To settle this anti-dilution dispute, and in anticipation of CDT Inc.'s IPO, the
23 parties to the Transaction Agreement entered into a Settlement and Amendment Agreement
24 on August 3, 2004, which amended the Transaction Agreement.

25 22. On December 14, 2004, the same parties, as well as a newly created party,
26 Opsys Management Limited ("Opsys Management"), entered into an Amended and
27 Restated Settlement and Amendment Agreement (the "Amended Settlement Agreement"), a
28 true and correct copy of which is attached as Exhibit D to the Bunzel Decl. filed April 2,

1 2007 (Dkt. 182). I was involved in the negotiations leading to the execution of these two
2 settlement agreements.

3 23. CDT Inc. priced its IPO December 15, 2004. Market trading on Nasdaq
4 commenced on December 16, 2004. The IPO formally closed on December 21, 2004. The
5 IPO price of CDT Inc.'s common stock was \$12 per share.

6 24. On December 29, 2004, and pursuant to the Transaction Agreement and the
7 Amended Settlement Agreement, Opsys' shareholders exercised their option requiring CDT
8 Inc. to acquire all the stock of Opsys in exchange for 931,633 shares of CDT Inc.'s
9 common stock (the "Opsys Limited Option").

10 25. The exercise of the Opsys Limited Option rather than either one of the other
11 two options provided for in the Transaction Agreement resulted in tax benefits for Opsys.
12 Had Opsys exercised its put option requiring CDT Inc. to acquire the remaining 84%
13 interest in CDT Oxford, Opsys would have become liable for a tax charge of approximately
14 30% of the consideration received from CDT Inc. Exercise of the call option permitting
15 CDT Inc. to acquire the remaining 84% interest in CDT Oxford also would have resulted in
16 a taxable gain by Opsys.

17 26. The 2004 transactions as structured protected Opsys' creditors in at least
18 three ways, as described in paragraphs 27, 28 and 29 below.

19 27. First, shares of CDT Inc. stock were held back to cover known and identified
20 liabilities. As required under the Amended Settlement Agreement, CDT Inc. withheld from
21 the option exercise price 133,938 shares of CDT Inc. stock to ensure satisfaction of Opsys'
22 identified liabilities, as set forth in Schedule A to the Amended Settlement Agreement.

23 28. Second, 422,610 shares of CDT Inc. stock went into an escrow to cover the
24 Reddy claim referred to in paragraph 16 above and unidentified liabilities, including
25 unidentified contingent liabilities.

26 29. Third, the remaining CDT Inc. shares paid for Opsys were issued to Opsys
27 Management pursuant to a "Deferred Consideration Agreement" entered into to protect
28 Kodak and certain other known creditors. Attached hereto as **Exhibit B** is a true and

1 correct copy of the Deferred Consideration Agreement, dated December 29, 2004, between
2 Opsys Management and Opsys' shareholders at the time. (From this document we have
3 redacted, on privacy grounds, the addresses but not the names of the shareholders.) The
4 Amended Settlement Agreement (clause 5.1) required the delivery of a complete and
5 correct copy of the Deferred Consideration Agreement to CDT Inc. None of the CDT Inc.
6 shares held by Opsys Management has been paid out to the former shareholders. The
7 shares are to be paid first to a former trade creditor of Opsys (Kodak), then to former debt
8 holders that had provided venture capital to Opsys, and only then to the former
9 shareholders.

10 30. As of December 29, 2004, when CDT Inc. acquired all of Opsys' stock, I
11 had no idea that Plaintiff was suing Opsys and CDT Ltd.

12 31. Neither I, nor, to my knowledge, anyone at CDT Inc. or CDT Ltd., knew at
13 the time of CDT Inc.'s IPO that Plaintiff was planning legal action against CDT Inc. or
14 against CDT Ltd.

15 32. Had CDT Inc. known at the time of its IPO that Plaintiff was planning legal
16 action against it or against CDT Ltd., or would claim that CDT Inc. or CDT Ltd. might
17 have some liability on Plaintiff's lease of real property to Opsys, CDT Inc. would not have
18 permitted the exercise of the option whereby it acquired Opsys' stock.

19 **The 2005 Transaction**

20 33. In May 2005, to simplify its corporate structure pursuant to a plan developed
21 in November 2004 that could not be implemented until after the completion of CDT Inc.'s
22 acquisition of Opsys, CDT Inc. transferred both its 16% interest in CDT Oxford and its
23 100% interest in Opsys to CDT Ltd. In addition, Opsys transferred its 84% interest in CDT
24 Oxford to CDT Ltd.

25 34. As a result, both CDT Oxford and Opsys are now direct, wholly owned
26 subsidiaries of CDT Ltd. and indirect subsidiaries of CDT Inc. CDT Ltd. is a second-tier
27 subsidiary of CDT Inc., so CDT Oxford and Opsys are third-tier subsidiaries. Mr. Ainslie's
28 statements to the contrary in his declaration (Ainslie Decl. (Dkt. 180) ¶¶ 9-10) are wrong.

1 35. Opsys has not liquidated.

36. The transfer in the ownership of Opsys made no difference to the creditors of Opsys. The transfer of 84% of the shares in CDT Oxford from Opsys to CDT Ltd. also made no practical difference, because CDT Ltd. had, since October 2002, the right to 98% of the profits of CDT Oxford (in exchange for managing and funding CDT Oxford), rendering negligible the value of a shareholding in CDT Oxford (equivalent to 2% of future profits).

37. As of May 2005, at the time of this transfer, Plaintiff's complaint in this action named as a defendant CDT Ltd. but not CDT Inc. Thus, the 2005 transaction transferred equity to—not away from—an entity that Plaintiff was then suing.

38. Attached hereto as **Exhibits C, D and E** are true and correct copies of the cover page and Exhibit 21.1 (Exhibit 21.1 entitled “List of Subsidiaries of the Registrant”) to each of the last three annual reports on Form 10-K filed by CDT Inc. Exhibit C is from 2004; Exhibit D is from 2005; and Exhibit E is from 2006. As they clearly show, Opsys was a subsidiary of CDT Inc., and CDT Oxford was a subsidiary of Opsys (hence a second-tier subsidiary of CDT Inc.), as of December 31, 2004, but both became subsidiaries of CDT Ltd. in 2005 and have remained so ever since.

18 **Control of the Litigation**

19 39. Plaintiff's suggestion that CDT Inc. controlled Opsys' defense of this action
20 is contrary to the facts.

21 40. In 2006, Opsys had three directors: Stephen Chandler; Dr. Jeremy
22 Burroughes; and me.

41. Stephen Chandler, in his capacity as a director of Opsys, supervised this litigation for Opsys until December 2006, when he ceased his full-time employment with CDT Ltd. He resigned as a director of Opsys in April 2007. I have supervised the litigation for Opsys, in my capacity as a director of Opsys, since January 2007.

27 //

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28 //

1 42. As a director of Opsys, Mr. Chandler participated in a mediation in this
2 action on behalf of Opsys.

3 43. As a director of Opsys, I participated in a settlement meeting with Plaintiff's
4 property manager, Frank Chiu, on February 17, 2007. David Tyfe, Chairman and Chief
5 Executive Officer of CDT Inc., was also present during this settlement meeting to represent
6 the interests of CDT Inc. (See Mr. Tyfe's declaration for his statement as to why he
7 attended this meeting.)

8 44. I participated in another settlement meeting on February 26, 2007. Andrew
9 Fields, in-house counsel for CDT Inc., attended this meeting to represent CDT Inc.

10 45. CDT Inc. took an interest in this litigation principally because Plaintiff had
11 named CDT Ltd. as a defendant in its original complaint and its first amended complaint,
12 and because Plaintiff had moved to add CDT Inc. as a defendant in November 2005.

13 46. Because of Plaintiff's attempts to sue CDT Inc. and CDT Ltd., Mr. Fields
14 attended the trial of Plaintiff's complaint.

15 47. I was excluded from the first six days of trial and could not attend on Opsys'
16 behalf because I was a potential witness.


17 48. Although Mr. Chandler remained a director of Opsys at that time and a part-
18 time employee of CDT Ltd., he was not obliged to travel outside the UK under the terms of
19 his contractual arrangements. He therefore could not be required to attend the trial.

20 49. The only other director of Opsys at the time, Dr. Jeremy Burroughes, did not
21 attend the trial because he is a scientist by training and would not have been able to
22 represent Opsys' interests effectively.

23 I declare under penalty of perjury under the laws of the United States of America
24 that the foregoing is true and correct.

25 Executed this 8th day of May, 2007 at Royston, England, UK.

26
27
28


Michael Black

RJN 184

EXHIBIT Q

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7 Attorneys for Non-Party/Respondent
8 CAMBRIDGE DISPLAY TECHNOLOGY, INC.

9 UNITED STATES DISTRICT COURT
10 NORTHERN DISTRICT OF CALIFORNIA
11 SAN FRANCISCO DIVISION
12

13 SUNNYSIDE DEVELOPMENT
14 COMPANY, LLC,

15 Plaintiff,

16 vs.

17 OPSYS LIMITED, a United Kingdom
Company,

18 Defendant.
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No. C-05-00553 MHP

**DECLARATION OF DAVID FYFE
IN OPPOSITION TO PLAINTIFF'S
MOTION TO ADD CAMBRIDGE
DISPLAY TECHNOLOGY, INC. AS
A PARTY TO ACTION AND
JUDGMENT**

Date: May 16, 2007
Time: 1:00 p.m.
Courtroom: 15, 18th Floor
Judge: Hon. Marilyn Hall Patel

RJN 185

1 I, **DAVID FYFE**, declare as follows:

2 1. I am the Chairman of the Board of Directors and Chief Executive Officer of
3 Cambridge Display Technology, Inc. ("CDT Inc."). I have held these positions since 2000.
4 I have never been an officer or director of Opsys Limited ("Opsys"), Opsys UK Limited
5 ("Opsys UK"), or CDT Oxford Limited ("CDT Oxford"). I have personal knowledge of the
6 matters stated in this declaration and, if called as a witness, could testify competently
7 thereto.

8 2. CDT Inc. is a holding company. It owns all the stock of CDT Holdings
9 Limited, which, in turn, owns all the stock of Cambridge Display Technology Limited
10 ("CDT Ltd."). CDT Ltd. currently owns all the stock of Opsys. In addition, CDT Ltd.
11 currently owns all the stock of CDT Oxford, a corporation formerly owned by Opsys and
12 formerly named Opsys UK Limited.

13 3. CDT Inc. is a leading developer of polymer organic light-emitting diode ("P-
14 OLED") technology, which makes possible energy-efficient, ultra-thin, lightweight displays
15 in a variety of electronic devices.

16 4. In mid-2002, CDT Inc. (then called CDT Acquisition Corporation) began
17 negotiating to acquire control of certain U.K.-based assets of Opsys, which owned or
18 controlled a number of patents that had the potential to be useful in developing the next
19 generation of high efficiency P-OLED materials. I was involved in these negotiations.

20 5. The Opsys research facilities developing the intellectual property based on
21 the patents that could be useful to CDT Inc. were all located in the U.K. near Oxford.

22 6. Opsys also had operations in the United States involving the pilot
23 manufacturing of displays based on small molecule emitters. The U.S. operations did not
24 involve printable P-OLEDs, as the U.K. operations did. Instead, they employed a
25 competing technology based on a license that Opsys had obtained from the Eastman Kodak
26 Company ("Kodak").

27 7. CDT Inc. was not interested in acquiring Opsys's U.S. operations for a
28 number of business reasons. The Kodak manufacturing process differed fundamentally

1 from the process used by CDT Inc., which had invested in its own pilot manufacturing
2 facility and had no need of another such facility, particularly one using non-compatible
3 production equipment. Because Kodak is a competitor of CDT Inc. in the licensing of
4 OLED technology, CDT Inc. did not wish to take any action that would endorse (tacitly or
5 otherwise) Kodak's technology. In addition, CDT Inc. had a business model specifically
6 eschewing the manufacturing business that Opsys's U.S. operations were seeking to enter—
7 the highly competitive, low-profit, capital-intensive business of display manufacturing.
8 Instead, the business model of CDT Inc. focuses on licensing its technology and
9 transferring that technology to display makers and others in the display supply chain.
10 Although CDT Inc. had invested in a process development line to develop manufacturing
11 process know-how, it never intended to be a volume manufacturer of displays. In contrast,
12 Opsys's U.S. operations intended to manufacture and sell display products.

13 8. The senior management of CDT Inc. made it absolutely clear to Opsys's
14 management from the outset that CDT Inc. had no interest whatsoever in the U.S. assets
15 and business of Opsys and that any deal would require a clean separation of the U.S.
16 business from the U.K. assets in which CDT Inc. was interested. Therefore, the 2002
17 transaction proceeded on this basis. Opsys had already placed its U.S. assets and business
18 into Opsys US Corporation. It placed its U.K. assets and business into another entity
19 (Opsys U.K.). A principal point of this structure was to effect this clean separation.

20 9. By means of the 2002 transaction, which closed in October 2002, CDT Ltd.
21 acquired control of Opsys UK. Thereafter, three out of twenty-three Opsys UK employees
22 became employees of CDT Ltd. Later in 2002, Opsys UK was renamed CDT Oxford
23 Limited.

24 10. Beginning in July 2003, the CDT Oxford facility in Oxford was gradually
25 shut down. Most of CDT Oxford's employees were laid off in July 2003; a few remained
26 on until October 2003 to oversee the shutdown. Three such employees subsequently
27 accepted offers to work for CDT Oxford in Cambridge. They and certain CDT Ltd.
28 employees, who were transferred to CDT Oxford, formed a new high efficiency materials

1 research group located in Cambridge and funded by one of CDT Inc.'s shareholders. This
2 group conducted research that built upon and expanded both the research previously
3 conducted by CDT Oxford and research conducted by CDT Ltd., thereby capturing the
4 synergies from CDT Ltd.'s acquisition of control over CDT Oxford's intellectual property.
5 CDT Oxford's employees used different laboratories than CDT Ltd.'s employees in
6 Cambridge.

7 11. Opsys had no operations of its own after the transfer of its U.K. operations to
8 Opsys UK/CDT Oxford in 2002. Opsys, however, has not been liquidated.

9 12. From time to time, the CDT Inc. Board of Directors has considered the
10 action brought by Sunnyside Development Company, LLC ("Plaintiff"), against Opsys, not
11 only because Opsys is a subsidiary of CDT Ltd. (and hence an indirect fourth-tier
12 subsidiary of CDT Inc.) but also because Plaintiff named CDT Ltd. in its original complaint
13 and in its first amended complaint, and because Plaintiff moved to add CDT Inc. as a party
14 in November 2005. Because of Plaintiff's attempts to sue CDT Ltd. and CDT Inc., I have
15 paid some attention to this litigation. CDT Inc. (and CDT Ltd.) did not direct the day-to-
16 day defense of Plaintiff's claim.

17 13. I participated in a settlement discussion with Plaintiff's property manager,
18 Frank Chiu, because Mr. Chiu asked that a representative of CDT Inc. attend. Mr. Chiu and
19 I did not speak again after this meeting. Michael Black, a director of Opsys, was present at
20 all times during that meeting.

21 14. CDT Inc. would not have acquired Opsys's stock in 2004 (CDT Inc. later
22 transferred that stock to CDT Ltd.) if CDT Inc. or CDT Ltd. had known that Plaintiff
23 claimed that the assignment of the lease agreement between Plaintiff and Opsys to Opsys
24 US Corporation was ineffective or that CDT Inc. or CDT Ltd. might be deemed to have any
25 liability under that lease.

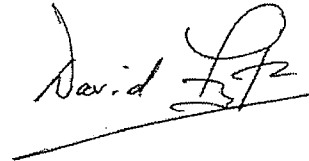
26 //

27 //

28 //

RJN 188

1 I declare under penalty of perjury under the laws of the United States of America
2 that the foregoing is true and correct. Executed this 7th day of May, 2007 at San Francisco,
3 California.

4
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9 David Fyfe _____
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RJN 189

EXHIBIT R

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CAMBRIDGE DISPLAY TECHNOLOGY, INC.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

SUNNYSIDE DEVELOPMENT
COMPANY, LLC,

Plaintiff,

vs.

OPSYS LIMITED, a United Kingdom
Company,

Defendant.

No. C-05-00553 MHP

**DECLARATION OF ALICE K. M.
HAYASHI IN OPPOSITION TO
PLAINTIFF'S MOTION TO ADD
CAMBRIDGE DISPLAY
TECHNOLOGY, INC. AS A PARTY
TO ACTION AND JUDGMENT**

Date: May 16, 2007
Time: 1:00 p.m.
Courtroom: 15, 18th Floor
Judge: Hon. Marilyn Hall Patel

RJN 190

1 I, **ALICE KWONG MA HAYASHI**, declare as follows:

2 1. I am an attorney licensed to practice in the State of California and before this
3 Court. I am a counsel at the law firm of Pillsbury Winthrop Shaw Pittman LLP, attorneys
4 for non-party/respondent Cambridge Display Technology, Inc. ("CDT Inc."). I have
5 personal knowledge of the facts stated herein and, if called as a witness, could testify
6 competently thereto.

7 2. The deposition of Frank Chiu was taken in this matter on July 28, 2006.
8 Attached hereto as Exhibit A are true and correct copies of the excerpts from Mr. Chiu's
9 deposition transcript cited in CDT Inc.'s Opposition to Plaintiff's Motion to Add
10 Cambridge Display Technology, Inc. as a Party to Action and Judgment.

11 3. The deposition of Damoder Reddy was taken in this matter on May 4, 2006.
12 Attached hereto as Exhibit B are true and correct copies of the excerpts from Mr. Reddy's
13 deposition transcript cited in CDT Inc.'s Opposition to Plaintiff's Motion to Add
14 Cambridge Display Technology, Inc. as a Party to Action and Judgment.

15 I declare under penalty of perjury under the laws of the United States of America
16 that the foregoing is true and correct. Executed this 7th day of May, 2007 at San Francisco,
17 California.

18
19 /s/ Alice Kwong Ma Hayashi
20 Alice Kwong Ma Hayashi
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RJN 191

Exhibit A to Declaration of Alice K. M. Hayashi

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

--oOo--

**CERTIFIED
COPY**

SUNNYSIDE DEVELOPMENT COMPANY,
LLC,

Plaintiff,

vs.

Case No. C 05-00553 MHP

OPSYS LIMITED, a United
Kingdom Company,

Defendant.

//

DEPOSITION OF FRANK CHIU

July 28, 2006

REPORTED BY:

INGRID GOVERS, CSR NO. 11669

RJN 193

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1 Pentalpha and whatever, \$132,000, does that refresh your
2 recollection -- is that the amount that was charged by
3 the contractor to clean the premises up?

4 A. No.

5 Q. Do you know what that amount consists of,
6 132,000?

7 A. That's the amount above and beyond what SCA
8 has been paid. That was subtracted from the total
9 amount. 120,000 wasn't included in the 132,000.

10 Q. And so that would, combined, be \$252,000?

11 A. Yes.

12 Q. And so what does 252 constitute? Is that the
13 amount paid to the contractor?

14 A. Paid to all the contractors that's involved in
15 the cleanup and the security and the -- and the cost
16 that was incurred during the time for the cleanup. That
17 may include the PG&E bill, the water, and so on and so
18 forth.

19 Q. The actual amount paid to the contractor is,
20 like, \$150,000 or so; is that right?

21 A. I haven't add up all the numbers.

22 Q. So you don't know?

23 A. I do not know.

24 MR. BURNS: Okay. Let me show you one other
25 document. This has been marked before, but I don't have

1 the number.

2 MS. HUBER: 46.

3 MR. BURNS: Q. I'm going to have you look at
4 Exhibit 46, which is an e-mail from Damoder Reddy to, I
5 believe, Stanley Hilton, an attorney, where he
6 introduces you to Mr. Hilton.

7 Did you have conversations with Mr. Reddy
8 before he wrote this e-mail to Mr. Hilton?

9 A. Yes.

10 Q. And can you -- on how many occasions did you
11 talk to him about the situation with Opsys Limited in
12 the days leading up to this December -- excuse me --
13 November 12th, '04 e-mail?

14 A. One or two times.

15 Q. And can you relate those conversations you had
16 with Mr. Reddy?

17 A. He said Sunnyside should file a lawsuit
18 against the lessee.

19 Q. Did he say anything else?

20 A. There may be something else, but I don't
21 recall in details.

22 Q. Did he say why you should sign -- or file a
23 lawsuit against the lessee?

24 MS. HUBER: His question is not limited to the
25 document in front of you, so you might want to listen to

294

1 the question.

2 THE WITNESS: No, he did not say that.

3 MR. BURNS: Q. Did he give you any
4 information which you thought would support a lawsuit?

5 A. He faxed me some IPO document.

6 Q. And what IPO document was this?

7 A. I think it's a Cambridge Display Technology
8 IPO.

9 Q. And you read that?

10 A. I read those couple pages.

11 Q. Did he give you any other information besides
12 that?

13 A. No.

14 Q. How did he come to, as far as you know,
15 introduce you to his -- or to this attorney, Mr. Hilton?

16 A. I asked him -- I asked him, since we do not
17 have any information about Opsys Limited nor any of the
18 transaction, we just -- we just do not know what is
19 going on. We do not know the whereabouts of these
20 people. We just don't know anything about Opsys Limited
21 and no other parties, so I ask him whether we can use
22 his attorney for the information that he know about
23 these matters, so I ask him, "Can I use your attorney?"

24 Q. And what did he say?

25 A. He said yes.


1 State of California)

2 County of Alameda)

3
4 I, INGRID GOVERS, hereby certify that the
5 witness in the foregoing deposition was by me duly sworn
6 to testify to the truth, the whole truth and nothing but
7 the truth in the within entitled cause; that said
8 deposition was taken at the time and place herein named;
9 that the deposition is a true record of the witness'
10 testimony as reported to the best of my ability by me, a
11 duly Certified Shorthand Reporter and disinterested
12 person, and was thereafter transcribed under my
13 direction into typewriting by computer; that the witness
14 was given an opportunity to read, correct and sign the
15 deposition.

16 I further certify that I am not interested in
17 the outcome of said action nor connected with nor
18 related to any of the parties in said action nor to
19 their respective counsel.

20 IN WITNESS WHEREOF, I have hereunder
21 subscribed my hand on this 9th day of August, 2006.

22
23 
24

25 INGRID GOVERS, CSR NO. 11669

Subj: Introduction of Stanley Hilton to Frank Chui
Date: 11/12/2004 4:03:48 PM Pacific Standard Time
From: Damoder
To: STAVROS3589
CC: Atgatg22

Stanley:

Frank Chui is in need of some legal help. Frank represents landlord of the building in Fremont which was leased by Opsys Limited. The lease was defaulted by Opsys Limited causing serious financial damage to Frank. Frank is interested in talking to you to see whether you can represent him in this case. I copied Frank on this e-mail so that you can contact each other.

Frank, you can reach Stanley Hilton on his Cell Phone Number: 415-378-6142.

Damoder Reddy
408-858-4808

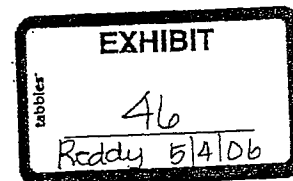


Exhibit B to Declaration of Alice K. M. Hayashi

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

--oOo--

SUNNYSIDE DEVELOPMENT
COMPANY, LLC,

Plaintiff,

vs.

OPSYS LIMITED, ET AL,

Defendant.

No. C 05-00553 MHP

DEPOSITION OF
DAMODER REDDY

Thursday, May 4, 2006

Pages (1 - 149)

CERTIFIED COPY

REPORTED BY: MICHELLE L. GIACHINO, CSR 11028 01-379565



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RJN 200

1 At any time in your dealings with Gary Rhea,
2 did you form an opinion as to Gary Rhea's reputation for
3 truthfulness?

4 MR. BURNS: Okay. I will enter the same
5 objection. Impermissible opinion. I will move to
6 strike.

7 THE WITNESS: Again, no specific opinion about
8 truthfulness aspects.

9 MS. HUBER: Let's mark as Plaintiff's
10 Exhibit 46, a document with the Bates No. SUN 001544.

11 Can you take a moment to review that document,
12 please.

13 (Plaintiff's Exhibit 46 was marked for
14 identification.)

15 MS. HUBER: Q. Is this an e-mail you sent to
16 Stanley Hilton?

17 A. Yes, I did.

18 Q. Do you recall sending this e-mail?

19 A. Yes, I do.

20 Q. Can you explain the circumstances that led you
21 to send this e-mail?

22 A. Frank Chiu asked me whether I know of any
23 legal counsel who could -- who could assist him, and so
24 he knew that I had -- I was using one legal counsel, and
25 he asked me whether I could introduce him, and then I

1 made the introduction.

2 Q. In the e-mail, you state, "The lease was
3 defaulted by Opsys Limited causing serious financial
4 damage to Frank."

5 Why did you say that?

6 A. Based on what Frank Chiu basically informed
7 me.

8 Q. Did you agree with that statement?

9 A. It's a legal matter, so I didn't really know
10 the details, so I couldn't really say. That's why I was
11 referring him to a lawyer.

12 Q. In November of 2004 when you sent this e-mail,
13 did you have any recollection of Frank taking the
14 position that Opsys Limited had breached the lease?

15 A. I think Frank and I talked a few times, and I
16 think that was his impression. He told me that the
17 lease was breached.

18 Q. Do you recall whether you ever had that
19 impression?

20 A. I really did not because the lease was
21 assigned.

22 Q. As you sit here today, do you believe Opsys
23 Limited breached the lease with Sunnyside?

24 MR. BURNS: I will object. Calls for a legal
25 conclusion. Move to strike. You can go ahead and

1 between September '03 --

2 A. Late '03, correct.

3 Q. From late '03 -- you don't recall any serious
4 discussions from late '03 until November '04?

5 A. I may have had discussions, but nothing that I
6 can remember specifically, yeah.

7 Q. Do you remember providing to Frank Chiu the
8 CDT IPO documents?

9 A. Yeah, I think I sent him saying that CDT is
10 filing for IPO and some published information which was
11 available on the open documents.

12 Q. And why did you provide Frank with the CDT IPO
13 documents?

14 A. Because CDT acquired Opsys and so that's why I
15 was informing him that this is happening.

16 Q. And why did you want to inform him that this
17 was happening?

18 A. I think it was just -- there was a -- there
19 was an event which I think I thought may be important
20 for him to know.

21 Q. Was it important for him to know because you
22 didn't think he knew before you gave him the IPO
23 documents?

24 A. Actually, I didn't know we knew that or not.
25 Again, we had a long-standing relationship, Frank and I,

1 so that was something that I thought I would let him
2 know, yeah.

3 Q. Because you weren't sure that he knew about
4 the CDT transaction?

5 A. Right. It's possible he knew, but it became
6 public knowledge at the time.

7 Q. Okay. Do you recall Frank Chiu's reaction to
8 learning about the CDT transaction?

9 MR. BURNS: What CDT transaction are you
10 talking about? Vague and ambiguous. Are you talking
11 about the IPO?

12 MS. HUBER: Sorry, let me restate the
13 question. I'll withdraw the question.

14 Q. Do you recall Frank Chiu's reaction to
15 receiving the CDT IPO documents you sent him?

16 A. I don't recall whether he simply replied in an
17 e-mail or he called me. I'm not sure.

18 Q. Other than the mode of communication, do you
19 remember anything about the substance of his response?

20 A. I'm just trying to remember what it is, and
21 nothing that sticks to my mind specifically.

22 Q. You don't recall if he was surprised or angry
23 or ...

24 A. No.

25 Q. Nothing?

1 CERTIFICATE OF REPORTER

2 I, MICHELLE L. GIACHINO, a Certified Shorthand
3 Reporter, hereby certify that the witness in the
4 foregoing deposition was by me duly sworn to tell the
5 truth, the whole truth, and nothing but the truth in the
6 within-entitled cause;

7 That said deposition was taken down in
8 shorthand by me, a disinterested person, at the time and
9 place therein stated, and that the testimony of the said
10 witness was thereafter reduced to typewriting, by
11 computer, under my direction and supervision;

12 That before completion of the deposition,
13 review of the transcript ☒ was ☐ was not requested.
14 If requested, any changes made by the deponent (and
15 provided to the reporter) during the period allowed are
16 appended hereto.

17 I further certify that I am not of counsel or
18 attorney for either or any of the parties to the said
19 deposition, nor in any way interested in the event of
20 this cause, and that I am not related to any of the
21 parties thereto.

22 DATED: 5/12/06

23
24 Michelle L. Giachino

25 MICHELLE L. GIACHINO, CSR No. 11028

EXHIBIT S

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alice.hayashi@pillsburylaw.com

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

SUNNYSIDE DEVELOPMENT
COMPANY, LLC,

Plaintiff,

vs.

OPSYS LIMITED, a United Kingdom
Company,

Defendant.

No. C 05-00553 MHP

**OPPOSITION OF CAMBRIDGE
DISPLAY TECHNOLOGY, INC. TO
PLAINTIFF'S MOTION TO ADD
CAMBRIDGE DISPLAY
TECHNOLOGY, INC. AS A PARTY
TO ACTION AND JUDGMENT**

Date: May 16, 2007
Time: 1:00 p.m.
Courtroom: 15, 18th Floor
Judge: Hon. Marilyn Hall Patel

Declarations filed herewith:

1. Michael Black (Dkt. 204)
2. David Fyfe (Dkt. 205)
3. Alice K. M. Hayashi (Dkt. 206)

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2	154 Cal. App. 3d 1144 (1984)	10
3	Ray v. Alad Corp.,	
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5	Troy Co. v. Products Research Co.,	
6	339 F.2d 364 (9th Cir. 1964)	21, 22
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8	495 F.2d 314 (7th Cir. 1974)	21
9	Weber v. John Crane, Inc.,	
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11	Statutes and Codes	
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1 I. INTRODUCTION.

2 By this motion, Plaintiff seeks to join non-party **CAMBRIDGE DISPLAY**
3 **TECHNOLOGY, INC.** ("CDT Inc.") to a judgment Plaintiff seeks to have entered on its
4 jury verdict against defendant Opsys Limited ("Opsys"). Plaintiff seeks to do so
5 summarily, by motion, without bothering to file a complaint against CDT Inc., or obtain its
6 answer, or participate in discovery or proceed to evidentiary hearing or trial—in short
7 without everything that goes by the name of "due process."

8 That won't wash. While parties may summarily be substituted where the facts are
9 simple and uncontroverted—a party dies, one public officer succeeds another—where, as
10 here, the facts are complex and disputed, due process and clear case law demand a fair
11 opportunity to develop the case and an evidentiary hearing. What Plaintiff seeks cannot be
12 done by motion.

13 There is, however, one thing that could be done summarily, and that is deny
14 Plaintiff's motion. As a matter of law, the three theories advanced by Plaintiff will not
15 work: That much can be determined without resolving disputed issues of fact.

16 *The successor liability doctrine:* Normally if one corporation buys assets from the
17 other, the purchaser takes only the assets and not the liabilities. The successor liability
18 doctrine creates four exceptions to this rule, but none fits here.

19 First and foremost, the doctrine does not apply because the transactions here were
20 not asset sales, they were stock sales. The doctrine does not apply to stock sales. But even
21 if we had asset sales here, none of the exceptions would apply. One exception applies when
22 the buyer agrees to assume the seller's liabilities; there was no such agreement here. The
23 second exception applies where the transaction is so close to a statutory merger that the law
24 deems it a de facto merger; these transactions have none of the earmarks of a merger and
25 none of the entities has disappeared. The third exception applies when the buyer pays
26 inadequate consideration for the assets yet continues to operate exactly the same business as
27 before; here, in contrast, CDT Inc. paid a price well in excess of the audited asset value of
28 the company it bought and then dismantled most of that company. The fourth exception

1 applies to attempts to defraud creditors; here, in contrast, the proceeds of the transactions
2 were held in escrow and trust for the benefit of creditors, known and unknown.

3 *The alter ego doctrine:* Alternatively, Plaintiff seeks to pierce the corporate veil—
4 not once, not twice but three times, all the way from Opsys, a third-tier subsidiary, up to
5 CDT Inc., its ultimate parent. Plaintiff does so despite making no showing whatsoever that
6 any of the entities it must pierce to reach CDT Inc. are shells, or don't observe corporate
7 formalities. And it does so despite the fact that it previously sued one of these entities—
8 Cambridge Display Technology Limited ("CDT Ltd.")—in this action and suffered
9 dismissal of those claims with prejudice. Dkt. 39.

10 *Fraudulent conveyance:* Finally, Plaintiff asserts that CDT Inc. committed fraud by
11 transferring its stock in Opsys to CDT Ltd. in May 2005, while CDT Ltd. was a defendant
12 in this action. A fraudulent conveyance normally involves the surreptitious transfer of
13 assets from the defendant to a third party out of reach. Here, the third party (CDT Inc.)
14 openly transferred its equity in Opsys to the then-defendant (CDT Ltd.). Some fraud.

15 *Laches:* For all these reasons, Plaintiff has no claim against CDT Inc., but there is
16 another reason as well. For two years Plaintiff sat on its rights until CDT Inc. went public
17 and bought stock in Opsys. Only then, after the public offering, and after a transaction that
18 never would have happened had Plaintiff spoken up earlier, did Plaintiff attack CDT Inc.'s
19 interest in Opsys. This is textbook laches: unreasonable delay coupled with prejudice.

20 II. STATEMENT OF FACTS.

21 A. CDT Inc., its affiliates and their corporate structure.

22 CDT Inc. is headquartered in Cambridge, England. A public company since
23 December 2004, its stock is traded on the NASDAQ Global Exchange.

24 At all times relevant to this case, CDT Inc. has had a first-tier subsidiary called CDT
25 Holdings Limited and a second-tier subsidiary, CDT Ltd., which, as noted above, once was
26 a defendant herein but was dismissed with prejudice in August 2005. Dkt. 39.

27 Since May 2005, CDT Ltd. has had several subsidiaries (which therefore are third-
28 tier subsidiaries of CDT Inc.). One is Opsys. Another is CDT Oxford Limited ("CDT

1 Oxford”), which until late 2002 was called Opsys UK Limited (“Opsys UK”). Before May
2 2004, the corporate structure was somewhat different, as shall be explained below.

3 **B. The transactions with Opsys in 2002.**

4 CDT Inc. is a leading developer of polymer organic light-emitting diode (“P-
5 OLED”) technology, which makes possible energy-efficient, ultra-thin, lightweight displays
6 in a variety of electronic devices. Declaration of David Fyfe, Dkt. 205 (“Fyfe Decl.”), ¶ 3.
7 In 2002, CDT Inc. began negotiating to acquire control of certain UK-based assets of
8 Opsys: some patents thought to be useful in developing the next generation of high
9 efficiency P-OLED materials. *Id.* ¶ 4. Opsys had research facilities in the UK near Oxford,
10 where it developed intellectual property based on these patents. *Id.* ¶ 5. Opsys also had US
11 operations in Fremont for the pilot manufacturing of displays based on small molecule
12 emitters. The US operations did not involve printable P-OLEDs, as the UK operations did.
13 Instead, they employed a competing technology based on a license that Opsys had obtained
14 from the Eastman Kodak Company (“Kodak”). *Id.* ¶ 6.

15 CDT Inc. wanted Opsys’ UK assets but did not want Opsys’ US assets for a number
16 of business reasons. The Kodak process differed fundamentally from the CDT Inc. process;
17 CDT Inc. had invested in its own facility and had no need of another such facility,
18 particularly one using incompatible production equipment. *Id.* ¶ 7. Kodak competes with
19 CDT Inc. in the licensing of OLED technology. Therefore, CDT Inc. did not wish to do
20 anything that would endorse Kodak’s technology. *Id.* CDT Inc. also wanted nothing to do
21 with the manufacturing business that Opsys’ US operations sought to enter—the highly
22 competitive, low-profit, capital-intensive business of display manufacturing. It has never
23 intended to be a volume manufacturer of displays; instead it seeks to license and transfer
24 technology to the companies that do manufacture displays. *Id.*

25 CDT Inc. made it clear to Opsys that CDT Inc. had no interest in the US assets and
26 business of Opsys, and that any deal would require a clean separation of the US operations
27 from the UK operations. *Id.* ¶ 8. Opsys agreed, so the transaction proceeded on the basis of
28 a clean separation: the UK assets were put into one subsidiary and the US assets into

1 another subsidiary. Opsys transferred its UK operations to Opsys UK. *Id.*; see Bunzel
 2 Decl. (Dkts. 182-85) ¶ 3, Ex. A at 5 (recital F) & 32 (clause 11.1). Opsys transferred its US
 3 operations to Opsys US Corporation (“Opsys US”). Fyfe Decl. ¶ 8. Despite Plaintiff’s
 4 suggestion otherwise (Mot. 9:14-15), Opsys did not transfer any assets, including IP, of
 5 Opsys US to Opsys UK. Declaration of Michael Black, Dkt. 204 (“Black Decl.”), ¶ 9.

6 On October 23, 2002, CDT Inc., Opsys and others entered into a Transaction
 7 Agreement (the “Transaction Agreement”). Bunzel Decl. ¶ 3. Ex. A. The terms are
 8 complex, but the essential points can be sketched briefly. CDT Inc. purchased a 16%
 9 interest in Opsys UK for \$2.5 million in cash. *Id.* at 16 (clause 2.1). CDT **Ltd.**—*not* CDT
 10 **Inc.**—got management control of Opsys UK and 98% of Opsys UK’s profits, if any. *Id.* at
 11 22 (clause 7). CDT **Ltd.**—*not* CDT **Inc.**—paid Opsys \$2 million in cash for a sublicense to
 12 Opsys’ IP. *Id.* at 21, 32 (clauses 5.1(iii), 14.2). Plaintiff claims that CDT **Inc.** got control
 13 of Opsys UK (Mot. 9:16-19) but that is wrong: CDT **Ltd.** got control.

14 The Transaction Agreement created two “put” options and one “call” option.
 15 Bunzel Decl. ¶ 3, Ex. A, at 16-20 & 25-30 (clauses 3 & 9). Only one actually was
 16 exercised—one of the “put” options (the “Opsys Limited Option”). It gave Opsys’
 17 shareholders the right to force CDT Inc. to buy Opsys on these conditions (among others):
 18 Opsys’ shareholders could exercise this option only if the aggregate liabilities, including
 19 contingent liabilities, of Opsys and its subsidiaries (excluding Opsys UK) were less than
 20 \$1.25 million (*id.* at 26 (clause 9.4(C))); the option exercise price would be reduced by the
 21 value of the aggregate current liabilities; and CDT Inc. would withhold from the exercise
 22 price the amount of all contingent liabilities until the liabilities materialized or until the
 23 statute of limitations expired (*id.* at 27-28 (clauses 9.11(A) & 9.12)).

24 Opsys expressly warranted that it was not a party to any contract that could not
 25 readily be performed by it on time; that it was not a party to, nor did it have any liability
 26 under, any lease; that it was not a party to any contract “of a value of more than £10,000” or
 27 “of one year or greater duration”; and that it was not under any obligation in respect of
 28 unaccrued or undisclosed liabilities in connection with operations in the US. Bunzel Decl.

1 ¶ 3, Ex. A, at 59-60 (sched. 3, part 2, clauses 9.1-9.2, 9.7(a)-(b), & 9.9). In its Disclosure
2 Letter dated October 23, 2002, Opsys explicitly represents that the Fremont lease was
3 assigned to Opsys US, and it attaches the Assignment of Lease and Consent of Lessor.
4 Black Decl. ¶ 10, Ex. A (Disclosure Letter at 9).

5 The structure was complex but its purposes were simple and straightforward: CDT
6 Inc. wanted Opsys' UK assets and not its US assets; and the parties wanted to avoid the
7 punitive taxes that would be levied on a sale of assets. Paragraphs 7 through 13 of the
8 Black Declaration explain the tax planning; we shall not burden the Court by repeating that
9 explanation here. The salient point is that there were sound business and tax reasons for the
10 structure, having nothing to do with disadvantaging Plaintiff or any other creditor. *Id.*

11 **C. The changes in the business of Opsys UK/CDT Oxford after October 2002.**

12 Late in 2002, Opsys UK was renamed CDT Oxford Limited. Fyfe Decl. ¶ 9.
13 Beginning in July 2003, the CDT Oxford facility in Oxford was gradually shut down. Most
14 of CDT Oxford's employees were laid off. *Id.* ¶ 10. Three employees eventually accepted
15 offers to continue working for CDT Oxford in Cambridge, where they and certain CDT Ltd.
16 employees, who were transferred to CDT Oxford, formed a new high efficiency materials
17 research group located in Cambridge. *Id.*

18 Two points here are salient: First, CDT Inc. did not merely continue the business of
19 Opsys UK but fundamentally transformed it. Fyfe Decl. ¶¶ 9-10. Second, Opsys and
20 Opsys UK remained and remain separate legal entities that observe the proper corporate
21 formalities and thus are entitled to have their separate existence recognized. Black Decl.
22 ¶¶ 14-18. As shall be shown below, the first point undermines Plaintiff's "successor
23 liability" argument, and the second point undermines Plaintiff's "alter ego" argument.

24 **D. The IPO and the exercise of the Opsys Limited Option in December 2004.**

25 Two things set the stage for the CDT/Opsys transaction of late 2004. The first was
26 the IPO of CDT Inc. The second was a dispute between CDT Inc. and Opsys over whether
27 an earlier round of private financing had triggered an anti-dilution provision in the
28 Transaction Agreement; if it had, Opsys' shareholders stood to get more shares of CDT Inc.

1 stock if CDT Inc. went public than they would get otherwise. Black Decl. ¶¶ 19-22.

2 The dispute was settled and CDT Inc. went public on December 15, 2004.
3 Plaintiff's manager, Frank Chiu, knew all about the public offering and had consulted an
4 attorney about suing, but he breathed not a word of this to anyone at CDT Inc. until after
5 the IPO had closed. See part III.D below.

6 After the IPO, Opsys' shareholders exercised the Opsys Limited Option, thus
7 requiring CDT Inc. to acquire the equity of Opsys in exchange for 931,633 shares of CDT
8 Inc.'s newly public common stock. Black Decl. ¶ 25. The number of shares of CDT Inc.
9 stock to be paid was calculated pursuant to a formula agreed as part of the settlement of the
10 anti-dilution dispute. Black Decl. ¶¶ 21-22; the Amended Settlement Agreement is Bunzel
11 Decl. ¶ 6, Ex. D, at 4-5 (clause 1.1(c)).

12 By exercising the Opsys Limited Option rather than the other options, Opsys and its
13 shareholders obtained significant tax benefits, which are detailed in Black Decl. ¶ 25. Once
14 again, the salient point is that sound tax planning—and not creditor avoidance—accounts
15 for the structure of the deal.

16 Far from harming creditors, the Transaction Agreement, as modified by the
17 Amended Settlement Agreement, protected creditors in at least three ways:

18 First, 133,938 shares of CDT Inc. stock (at the IPO price of \$12 a share, Black Decl.
19 ¶ 23, this amounted to \$1,607,256) were held back to cover known and identified liabilities,
20 as set forth in Schedule A to the Amended Settlement Agreement. Bunzel Decl. ¶ 6, Ex. D,
21 at 6 (clause 1.1(g)); Black Decl. ¶ 27. The list in Schedule A did not include the Fremont
22 lease. Bunzel Decl. ¶ 6, Ex. D, at 20-21. Opsys Management (an entity created to hold the
23 CDT Inc. shares) and the directors of Opsys (Michael Holmes and Alexis Zervoglos)
24 warranted that there were no facts known to them, after reasonable inquiry, that would
25 cause a reasonable person to conclude that “there are any liabilities of Opsys, whether
26 absolute, accrued, contingent, or otherwise, other than those identified in Schedule A or
27 Schedule B. . . .” *Id.* at 9 (clause 1.1(h)), 11 (clause 2.1). (Schedule B listed a claim by
28 Damoder Reddy, who had served as COO either of Opsys or of Opsys US.)

1 Second, 422,610 shares of CDT Inc. stock (at \$12 a share, \$5,071,320) went into
2 escrow as security for contingent and unidentified liabilities of Opsys (including the Reddy
3 claim in Schedule B). *Id.* at 9-10 (clause 1.1(h)).

4 Third, the remaining CDT Inc. shares paid for Opsys were issued to Opsys
5 Management (Bunzel Decl. ¶ 6, Ex. D, at 10 (clause 1.1(h)), to be distributed pursuant to a
6 “Deferred Consideration Agreement” between Opsys Management and Opsys’
7 shareholders. Black Decl. ¶ 29, Ex. B. None of the CDT Inc. shares held by Opsys
8 Management has been paid out to the former shareholders. The shares are to be paid first to
9 a former trade creditor of Opsys (Kodak), then to former debt holders that had provided
10 venture capital to Opsys, and only then to the former shareholders. Black Decl. ¶ 29.

11 Opsys’ shareholders could exercise the Opsys Limited Option only if Opsys’
12 liabilities were below a specified level. CDT Inc. would not have allowed the exercise and
13 CDT Inc. would not have purchased Opsys’ stock if CDT Inc. had know that the Fremont
14 lease assignment was ineffective or that Plaintiff was planning legal action against CDT
15 Inc. or CDT Ltd. on the Fremont lease. Fyfe Decl. ¶ 14; Black Decl. ¶¶ 30-32.

16 E. **The transfer of Opsys and CDT Oxford to CDT Ltd. in May 2005.**

17 CDT Inc. held the stock of Opsys for only a short time. In May 2005, to simplify its
18 corporate structure, CDT Inc. transferred both its 16% interest in CDT Oxford and its 100%
19 interest in Opsys to CDT Ltd. In addition, Opsys transferred its 84% interest in CDT
20 Oxford to CDT Ltd. As a result, both CDT Oxford and Opsys are now direct, wholly
21 owned subsidiaries of CDT Ltd. and indirect third-tier subsidiaries of CDT Inc. Black
22 Decl. ¶¶ 33-38. These transfers were planned in late 2004, before Plaintiff filed its claim.
23 Black Decl. ¶¶ 24-25. These transfers occurred in May 2005, when CDT Ltd., not CDT
24 Inc., was a defendant in this action. *Id.*

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25 III. **ARGUMENT.**

26 Plaintiff moves under Rule 25(c) and Rule 69(a) (all references to “Rule” herein are
27 to the Federal Rules of Civil Procedure) to add CDT Inc. to any judgment against Opsys.
28 As discussed below, Rule 69(a) requires the same substantive showing of successor liability

1 as Rule 25(c), or a showing that CDT Inc. is Opsys' alter ego, *plus* a showing that CDT Inc.
2 controlled Opsys' defense of Plaintiff's action. Plaintiff's motion should be denied under
3 both Rule 25(c) and Rule 69(a).

4 A. **The Court should either deny Plaintiff's motion outright or order an**
5 **evidentiary hearing.**

6 Rule 25(c) provides a procedure for substituting one party for another in cases of
7 death, incompetency or transfer of interest or public office. Where the facts underlying the
8 grounds for substitution are incontrovertible (e.g., death, appointment of a new Attorney
9 General), the substitution can be made summarily, without an evidentiary hearing or trial.
10 But where the facts are disputed, due process requires at least an evidentiary hearing
11 (following appropriate discovery) and sometimes a trial before the decision whether to
12 substitute one party for another can be made. *Luxliner P.L. Export Co. v. RDI/Luxliner,*
13 *Inc.*, 13 F.3d 69 (3d Cir. 1993).

14 The plaintiffs in *Luxliner* moved under Rule 25(c), as Plaintiff does here, to join or
15 substitute a corporation, Sturgis Lux-Liner Homologation, Inc. ("Sturgis"), on a judgment
16 previously entered against another corporation, RDI/Luxliner, Inc. ("RDI"). Sturgis had
17 purchased RDI's assets before entry of judgment against RDI, making RDI judgment-proof.
18 *Id.* at 71. The district court granted the motion, finding that Sturgis' purchase of RDI's
19 assets had resulted in a de facto merger and that Sturgis was a mere continuation of RDI.
20 But the Third Circuit reversed, holding that because there were conflicting affidavits
21 concerning whether Sturgis was RDI's successor in interest, the district court should have
22 held an evidentiary hearing. *Id.* at 70.

23 *Luxliner* emphasized that "[b]efore a party may be deprived of a property interest,
24 due process requires, at a minimum, notice and an opportunity to be heard." *Id.* at 72
25 (citations omitted). The court said that Sturgis' due process interest were "particularly
26 compelling" because Sturgis was joined "not merely in ongoing litigation but on a
27 judgment already entered against RDI." *Id.* In such a context, the court held, a district
28 court must determine "whether the affidavits 'show that there is no genuine issue as to any

1 material fact and that the moving party is entitled to [joinder or substitution] as a matter of
2 law.” *Id.* (quoting Fed. R. Civ. P. 56(c)). If there are genuine issues of material fact, the
3 court must conduct an evidentiary hearing. *Id.* at 72-73. *Accord, EEOC v. Pan American*
4 *World Airways, Inc.*, No. C-81-3636 RFP, 1987 U.S. Dist. LEXIS 15182, at *8 (N.D. Cal.
5 Dec. 1, 1987) (denying plaintiff’s pre-trial Rule 25(c) motion to join a new defendant where
6 the motion raised numerous factual disputes, and observing that “granting such a motion
7 requires extensive factual development, and such development is sorely lacking here”).

8 It is obvious, even from a cursory reading of the declarations submitted on this
9 motion, that here the facts are hotly disputed on every level. Our witnesses will say that
10 Plaintiff does not understand the corporate transactions it purports to describe and its
11 attempts to ascribe nefarious motives to CDT Inc. are wholly without merit. Plaintiff has
12 not adduced enough evidence even to create a genuine issue of material fact. Its motion
13 should therefore be summarily denied. If the Court finds, however, that there might be
14 genuine issues of material fact, then it must at least hold an evidentiary hearing before
15 deciding whether to add CDT Inc. as a judgment debtor. *See Luxliner*, 13 F.3d at 72.

16 Plaintiff has acknowledged that an evidentiary hearing would be appropriate here.
17 It originally sought to proceed against CDT Inc. via complaint. On November 28, 2005,
18 when seeking leave to file a second amended complaint, it stated, “If [Rule 25(c)’s]
19 application affects substantive due process, such as substituting a party *after* a judgment,
20 then the Court should conduct an evidentiary hearing to decide whether the motion should
21 be granted.” Dkt. 55, at 6:17-19 (emphasis in original) (citing *Luxliner*, 13 F.3d at 72).
22 More recently, in Plaintiff’s Post-Trial Case Management Statement, it sought to renew its
23 motion to add CDT Inc. as a defendant, stating that if the Court granted this motion, it
24 would “file and serve a new pleading that adds Cambridge as an additional party to the
25 existing Second Amended Complaint.” Dkt. 171, at 1:20-25. Plaintiff also asked the Court
26 to “set a schedule for adjudicating the successor liability of Cambridge,” estimating that
27 discovery would take 90 to 120 days. *Id.* at 1:25-28. Only when it filed its current motion
28 (Dkt. 179) did Plaintiff switch ground and argue that successor liability can be determined

1 without pleadings, discovery and an evidentiary hearing. If the Court does not deny
2 Plaintiff's motion out of hand, it should schedule an evidentiary hearing.

3 **B. CDT Inc. is not liable as a successor.**

4 Plaintiff argues this issue under California law. Mot. 14-15. But the Transaction
5 Agreement provides that English law should apply. Bunzel Decl. ¶ 3, Ex. A at 51 (clause
6 36). As the 2002 transaction in particular involves the UK assets of several UK companies,
7 it is not at all clear that California law should be applied. But until we can obtain expert
8 advice on the UK law of successor liability (if any), we shall assume *arguendo* that
9 California law applies without conceding the point.

10 **1. The successor liability doctrine has no application to stock purchases.**

11 Plaintiff's principal argument that that CDT Inc. is a successor to Opsys under the
12 "successor liability" doctrine. That doctrine—a limited exception to the principle that a
13 corporation can normally sell assets, even all its assets, without also transferring its
14 liabilities to the vendee—applies only to asset purchases, not stock purchases. *Potlatch*
15 *Corp. v. Superior Court*, 154 Cal. App. 3d 1144, 1150 (1984). The transactions here were
16 fundamentally stock-for-stock deals. CDT Inc. did not buy assets; it and CDT Ltd. bought
17 equity interests in Opsys and Opsys UK. Accordingly, the successor liability doctrine has
18 no application here.

19 *Potlatch* held that a corporation (Potlatch) was not liable for damages caused by a
20 defective product manufactured by another company before Potlatch purchased all the
21 outstanding stock of that company. The court observed, "The difference between an
22 acquisition of capital stock and an acquisition of physical assets is no mere matter of form."
23 *Id.* at 1150. "It implicates fundamental concepts and principles of California and United
24 States law: corporate identity and shareholder immunity." *Id.*; see also *Marks v.*
25 *Minnesota Mining & Mfg. Co.*, 187 Cal. App. 3d 1429, 1436 (1986) (listing factors that
26 indicate "whether a transaction cast in the form of an *asset sale* actually achieves the same
27 practical result as a merger") (emphasis added); *Phillips v. Cooper Labs., Inc.*, 215 Cal.
28 App. 3d 1648, 1660 (1989) (holding that *Marks* did not apply to stock sale).

1 Here, CDT Inc. purchased the stock of Opsys in 2004; it never purchased the assets
2 of Opsys. Accordingly, the successor liability doctrine simply does not apply.

3 Plaintiff's characterization of the earlier 2002 transaction as an asset purchase also
4 is wrong. In 2002, CDT Ltd. agreed to manage and fund the operations of Opsys UK. This
5 was a management agreement, not an asset purchase. The parties were CDT Ltd. and
6 Opsys UK (later renamed CDT Oxford)—not CDT Inc. and Opsys, the two companies now
7 before the Court. Opsys UK is not the same as Opsys, and CDT Inc. is not the same as
8 CDT Ltd. Plaintiff admits that CDT Inc. and CDT Ltd. are different companies. *E.g.*, Mot.
9 13 n.24. Plaintiff admits that the 2002 transaction involved Opsys UK, that it was not until
10 2004 that CDT Inc. acquired Opsys and that the 2004 transaction was "a 100% stock deal."
11 Mot. 18 n.32. These admissions defeat Plaintiff's successor liability claim.

12 2. **Even if CDT Inc. had purchased Opsys' assets, the successor liability doctrine**
13 **would not apply.**

14 A corporation that purchases the assets of another corporation ordinarily does not
15 assume the debts of the selling corporation.¹ Only if one of four recognized exceptions
16 applies is the vendee liable for the vendor's debts. As stated by the California Supreme
17 Court in *Ray v. Alad Corp.*, 19 Cal. 3d 22 (1977), the four recognized exceptions are:
18 "(1) there is an express or implied agreement of assumption, (2) the transaction amounts to
19 a consolidation or merger of the two corporations, (3) the purchasing corporation is a mere
20 continuation of the seller, or (4) the transfer of assets to the purchaser is for the fraudulent
21 purpose of escaping liability for the seller's debts." *Id.* at 28.² Plaintiff previously argued
22 that only *one* of these four exceptions applied—the de facto merger exception. Dkt. 48, at
23 12:8-13:28. Although it now seeks to invoke all four, its earlier decision not to claim the

24 ¹ In contrast, when there has been a statutory merger, the surviving corporation
25 assumes the disappearing corporation's liabilities. Plaintiff concedes that there has been
no statutory merger of CDT Inc. and Opsys. Mot. 12:15-17.

26 ² *Ray* created a fifth exception to the general rule of non-liability, but that fifth
27 exception has since been limited to cases of strict tort liability for product defects. *See*
28 *Franklin v. USX Corp.*, 87 Cal. App. 4th 615, 627-29 (2001); *see also* Mot. 17 n.30
(agreeing that this fifth exception does not apply here).

1 other three exceptions underscores the weakness of its position.

2 a. **CDT Inc. did not agree to assume Opsys' liabilities.**

3 CDT Inc. never agreed to assume Opsys' liabilities, whether expressly or by
4 implication. Instead, before the exercise of the Opsys Limited Option and its purchase of
5 Opsys' stock, CDT Inc. took steps to ensure that it would *not* assume Opsys' liabilities and
6 that Opsys would pay those liabilities itself. The 2002 Transaction Agreement provided
7 that the Opsys Limited Option could not be exercised unless Opsys' aggregate liabilities,
8 including its contingent liabilities, were less than \$1.25 million. The 2004 Amended
9 Settlement Agreement provided that all of Opsys' identified liabilities would be satisfied
10 out of the consideration payable for the Opsys shares. CDT Inc. also deposited part of this
11 consideration into an escrow account as security for any unidentified liabilities of Opsys,
12 including contingent liabilities.

13 Plaintiff argues that CDT Inc. understood there was a risk of undisclosed contingent
14 liabilities and that plaintiffs might even assert claims for such liabilities against CDT Inc.
15 Mot. 17:21-18:1. But that does not mean that CDT Inc. agreed to assume such liabilities.
16 To the contrary, CDT Inc. insisted on an escrow and a trust and set-asides, as outlined in
17 part II.D above, to ensure that the former Opsys shareholders would continue to bear
18 responsibility for such claims. *See* Black Decl. ¶¶ 19-32. These provisions are compelling
19 evidence that CDT Inc. did *not* agree to assume Opsys' unidentified contingent liabilities.
20 *See Franklin*, 87 Cal. App. 4th at 621-22 (buyer held not liable as successor-in-interest
21 where, among other factors, asset purchase agreement showed unambiguously that buyer
22 did not assume seller's contingent tort liabilities); *Chaknova v. Wilbur-Ellis Co.*, 69 Cal.
23 App. 4th 962, 967-69 (1999) (buyer held not liable as successor-in-interest in part because
24 it had assumed only certain specific financial liabilities in asset purchase agreement, which
25 did not include contingent tort liabilities), *abrogated on other grounds*, *Weber v. John*
26 *Crane, Inc.*, 143 Cal. App. 4th 1433 (2006).

27 Plaintiff cites a provision in the Transaction Agreement stating that CDT Inc. and
28 CDT Ltd. "shall be responsible for all liabilities arising from its management of Opsys

1 UK.” Mot. 18:1-2 (citing Bunzel Decl. ¶ 3, Ex. A at 23 (clause 7.5)). But this provision
 2 plainly does not state that CDT Inc. shall be responsible for all liabilities of Opsys. The
 3 “liabilities arising from [CDT Ltd.’s] management of Opsys UK” do not include liabilities
 4 of Opsys—a different corporation than Opsys UK—which are wholly unrelated to CDT
 5 Ltd.’s management of Opsys UK.

6 Plaintiff concedes that CDT Inc. intended not to assume any obligations arising
 7 from Opsys US operations (Mot. 17:18-19), but argues that the Fremont lease is different
 8 because it is an obligation of Opsys itself. This argument is irrelevant. The Transaction
 9 Agreement and Amended Settlement Agreement make clear that CDT Inc. did not assume
 10 any of Opsys’ liabilities, including liability for the Fremont lease—whether or not it is
 11 characterized as a “US obligation.”

12 **b. CDT Inc.’s purchase of Opsys’ stock did not amount to a de facto merger.**

13 In evaluating claims of de facto merger, courts consider the following factors:

- 14 (1) Was the consideration paid for the assets solely stock of the buyer or
 15 its parents?
- 16 (2) Did the buyer continue the same enterprise after the sale?
- 17 (3) Did the shareholders of the seller become shareholders of the buyer?
- 18 (4) Did the seller liquidate?
- 19 (5) Did the buyer assume the liabilities necessary to carry on the
 business of the seller?

20 *Marks*, 187 Cal. App. 3d at 1436.³ Here, four of the questions must be answered “no.”

21 Only one question—the first—even allows of any ambiguity.

- 22 (1) *Was the consideration paid for the assets solely stock of the buyer or its*
 23 *parents?* The consideration paid in 2004 by CDT Inc. for Opsys’ stock was CDT Inc.

24 _____
 25 ³ Citing *Herrera v. Singh*, 118 F. Supp. 2d 1120 (E.D. Wash. 2000), Plaintiff offers
 26 what appears to be an alternative test for successor liability. Mot. 12:27-13:3 (arguing
 27 that a transferee may be liable for a judgment when it is a “bona fide successor,” the
 28 transferee had notice of the potential liability, and the predecessor is unable to directly
 provide adequate relief). In fact, *Herrera* describes the “successorship doctrine” under
 federal common law. 118 F. Supp. 2d at 1123 (observing that this doctrine is frequently
 invoked in employment situations). *Herrera* is therefore irrelevant here.

1 stock. But Plaintiff urges the Court to look at the 2002 transaction as well. If one does so,
 2 one sees this: In 2002, CDT Inc. paid not stock but \$2.5 million cash for stock not in Opsys
 3 but in Opsys UK.

4 (2) *Did the buyer continue the same enterprise after the sale?* No. Opsys had
 5 no operations of its own after the transfer of its UK operations to Opsys UK in 2002. Fyfe
 6 Decl. ¶ 11. Hence, Opsys had no operations either before or after its acquisition by CDT
 7 Inc. in 2004. CDT Inc. did not either continue or discontinue Opsys' business after the
 8 acquisition. Plaintiff argues, in effect, that CDT **Inc.** continued the same enterprise after its
 9 purchase of Opsys in 2004 because CDT **Ltd.** continued the business of Opsys UK after
 10 CDT **Ltd.** acquired control of Opsys UK in 2002. *See* Mot. 18:22-19:7. But CDT Inc. and
 11 CDT Ltd. are different companies, just as Opsys and Opsys UK are different companies.
 12 Moreover, CDT Ltd. did *not* continue the business of Opsys UK as before. The facts here
 13 are not even remotely like the facts in *Ray v. Alad*, where the successor continued the old
 14 business in every respect. 19 Cal. 3d at 26-28. Here, in contrast, virtually all the
 15 employees were let go, the Oxford facility was closed and the few employees left joined a
 16 new lab in Cambridge. Fyfe Decl. ¶¶ 9-11.⁴ Such facts do not create successor liability.
 17 *See Orthotec, LLC, v. REO SpineLine, LLC*, 438 F. Supp. 2d 1122, 1131 (C.D. Cal. 2006)
 18 (holding that an alleged successor did not continue the same enterprise where it hired some
 19 of predecessor's employees, developed relationships with some of predecessor's sales
 20 agents and operated out of the same office space, but marketed its own products and
 21 retained its own trade name).

22 (3) *Did the shareholders of the seller become shareholders of the buyer?* For
 23 the most part, no. Except in settlement of two personal claims, the former Opsys
 24 shareholders have not yet received any CDT Inc. stock, and none will be distributed to them
 25 unless Kodak and certain debt holders are paid. Black Decl. ¶ 29. The de facto merger

26 _____
 27 ⁴ Plaintiff says the operations of CDT Oxford were "fully 'consolidated' into
 28 Cambridge or Cambridge's other affiliates." Mot. 10:5-6 (citing Bunzel Decl. ¶ 8,
 Ex. F). But the press release Plaintiff cites describes only a "consolidation of resources."

1 exception applies “where the consideration consists wholly of shares of the purchaser’s
2 stock which are *promptly distributed* to the seller’s shareholders in conjunction with the
3 seller’s liquidation.” *Marks*, 187 Cal. App. 3d at 1435 (citations and internal quotations
4 omitted) (emphasis added). Even if some former Opsys shareholders eventually receive
5 some CDT Inc. stock, they will not have been paid “promptly.”

6 (4) *Did the seller liquidate?* No. Opsys has not liquidated. Black Decl. ¶ 35;
7 Fyfe Decl. ¶ 11. During the five months that CDT Inc. held Opsys’ stock directly, CDT
8 Inc. did not dispose of Opsys’ only material asset, its 84% interest in CDT Oxford. Opsys
9 did not transfer its interest in CDT Oxford to CDT Ltd. until after CDT Inc. transferred
10 Opsys to CDT Ltd. As Plaintiff itself has repeatedly emphasized, it seeks to add CDT **Inc.**
11 to a judgment here, not CDT **Ltd.** *See, e.g.*, Mot. 13 n.24.

12 (5) *Did the buyer assume the liabilities necessary to carry on the business of the*
13 *seller?* No. CDT Inc. did not assume Opsys’ liabilities. *See* part II.D above.

14 The differences between the facts here and those in *Marks* illustrate why a different
15 result is required. In *Marks*, the court held that there had been a de facto merger where,
16 among other factors, the predecessor corporation was required to change its name (so that
17 the successor corporation could use it), distribute the successor’s stock to its shareholders,
18 and dissolve as soon as practicable; all of the predecessor’s employees, including the seven
19 shareholders, were asked to sign employment agreements with the successor; all five
20 founders of the predecessor continued to work for the successor in substantially the same
21 capacity; the successor assumed essentially all normal operating liabilities of the
22 predecessor; and the successor manufactured and marketed the same products as the
23 successor. 187 Cal. App. 3d at 1432, 1435-36. In contrast, Opsys did not change its name
24 and has not dissolved. Opsys Management has not distributed the CDT Inc. stock to the
25 former Opsys shareholders. Only a handful of Opsys UK employees became employees of
26 CDT Ltd.; most were laid off within a matter of months. Opsys’ CEO, CFO, and COO
27 were never employees of CDT Inc. or CDT Ltd. None of them has ever been a member of
28 CDT Inc.’s Board of Directors. Black Decl. ¶¶ 16-17.

1 c. **CDT Inc. is not a mere continuation of Opsys.**

2 “California decisions holding that a corporation acquiring the assets of another
3 corporation is the latter’s mere continuation and therefore liable for its debts have imposed
4 such liability only upon a showing of one or both of the following factual elements: (1) no
5 adequate consideration was given for the predecessor corporation’s assets and made
6 available for meeting the claims of its unsecured creditors; (2) one or more persons were
7 officers, directors, or stockholders of both corporations.” *Ray*, 19 Cal. 3d at 29.
8 Subsequent decisions have clarified that the first of these elements is determinative. The
9 “crucial factor” in determining whether a corporate acquisition constitutes a mere
10 continuation is “whether adequate cash consideration was paid for the predecessor
11 corporation’s assets.” *Franklin*, 87 Cal. App. 4th at 625. The *Franklin* court said that all
12 the cases cited by *Ray* “involved the payment of inadequate cash consideration, and some
13 also involved near complete identity of ownership, management or directorship after the
14 transfer.” *Id.* at 627. *Franklin* therefore held that a buyer was not a mere continuation of a
15 seller even though the same individual was president and a board member of both
16 corporations. *Id.* at 626-27. To the same effect are *Orthotec, LLC*, 438 F. Supp. 2d at 1128
17 n.6, 1133; and *Maloney v. American Pharm. Co.*, 207 Cal. App. 3d 282, 287 (1988)
18 (refusing to find one corporation liable as a successor absent the “essential ingredient” of
19 inadequate consideration, although the corporation held itself out as a continuation of the
20 first corporation and the two corporations shared a common officer). *Mahoney* also hold
21 that the party asserting successor liability bears the burden of proving inadequate
22 consideration. *Maloney*, 207 Cal. App. 3d at 288 & n.3.

23 *Adequacy of consideration:* CDT Inc. paid 931,633 shares of its common stock for
24 Opsys’ stock in 2004. At the IPO price of \$12 per share, this amounts to \$11,179,596.
25 Furthermore, Opsys had received \$5 million in cash in 2002—CDT Inc. had paid \$2.5
26 million for its 16% interest in Opsys UK; CDT Ltd. had paid \$2 million for a patent license;
27 and CDT Inc. had paid \$500,000 for a call option to acquire 84% of Opsys UK (Bunzel
28 Decl. ¶ 3, Ex. A, at 16 (clause 3.1)). Thus, the 2002 and 2004 transactions together resulted

1 in payments totaling \$16,179,596. This far exceeds the book value of Opsys' assets, which
2 was £1.8 million (\$2.9 million) as of September 30, 2002, just before execution of the
3 Transaction Agreement. Bunzel Decl. ¶ 18, Ex. M at OPS 07500. (Amounts in British
4 pounds have been converted to US dollars at the September 30, 2002 rate of £1 to \$1.56
5 (<http://www.oanda.com/convert/fxhistory>).)

6 The same balance sheet shows that Opsys' *liabilities* exceeded £17 million. *Id.*
7 Plaintiff argues that adequacy of consideration should be measured against the seller's
8 liabilities rather than the assets purchased—a novel position for which Plaintiff cites no
9 authority. A rule requiring a purchaser of a corporation's assets to pay enough to settle all
10 of the corporation's liabilities—regardless of the value of the assets themselves—would
11 place such a corporation's creditors in a better position than if there had been no acquisition
12 at all. *Cf. Katzir's Floor & Home Design, Inc., v. M-MLS.com*, 394 F.3d 1143, 1151 (9th
13 Cir. 2004). It would mean that a corporation in distress could never liquidate its assets—
14 truly a senseless result.

15 Plaintiff argues that CDT Inc. initially reported a \$26.894 million purchase price for
16 CDT Oxford, based on the cash and stock paid or to be paid to Opsys and its shareholders.
17 Bunzel Decl. ¶ 7, Ex. E, at 80 (CDT Inc.'s Form 10-K). This figure was reduced in
18 December 2004 to \$19.679 million to reflect a decrease in the value of CDT Inc.'s common
19 stock. *Id.* at 82. Plaintiff claims that these figures reflect how much CDT Oxford or Opsys
20 was worth. Mot. 10:15-17. But as noted, Opsys' own audited financial statements dated
21 September 30, 2002, just before to the execution of the Transaction Agreement, show assets
22 of only £1.8 million (\$2.9 million). Bunzel Decl. ¶ 18, Ex. M at OPS 07500. Opsys had a
23 negative net worth of £15.5 million (\$24.1 million). *Id.* It had lost £19.7 million (\$30.8
24 million) for the year ending September 30, 2002. *Id.* at OPS 07499; *see also* Dkt. 200-1
25 ¶ 2, Ex. A at 4-6 (expert witness report).

26 The claim that Opsys' assets were worth \$26.894 million or \$19.679 million (*see*
27 Mot. 10:15-17) depends on the declaration of Plaintiff's expert Paul Ainslie, who candidly
28 admits that he has "not yet reviewed" contracts and records that he "would expect to

1 review...to complete an opinion” about whether Opsys received fair value for assets
 2 transferred to CDT Inc. Ainslie Decl. ¶ 11. Moreover, the \$26.9 million and \$19.7 million
 3 numbers represent the price paid by CDT Inc., *not* the value of Opsys’ assets. Plaintiff
 4 would have the Court determine the adequacy of the consideration by reference to the
 5 amount of the consideration. This is circular: If the value of the assets is the same as the
 6 consideration paid, then the consideration paid is necessarily adequate. Black Decl. ¶ 11;
 7 *see also* Dkt. 200-1 ¶ 2, Ex. A at 4-6 (expert witness report re: valuation of Opsys’ assets).

8 *Interlocking directors and officers:* Plaintiff asserts that Opsys’ financial controller
 9 became a director of Opsys UK, that Michael Holmes became an observer on the CDT Inc.
 10 Board of Directors and that Opsys shareholders became CDT Inc. shareholders. Mot.
 11 20:19-21:2. These assertions do not come close to making CDT Inc. the successor to
 12 Opsys. Whether or not Michael Holmes was an observer on the CDT Inc. board is
 13 irrelevant; he was not a director, and there is no such creature as an “observer director”
 14 (Bunzel Decl. ¶ 21). Although CDT Inc. or CDT Ltd. employees have served as directors
 15 of Opsys, no director of CDT Inc. has ever been a director of Opsys or Opsys UK and the
 16 principal shareholders and officers of Opsys have never worked for CDT Inc. or CDT Ltd.
 17 Black Decl. ¶¶ 16-17. Whether they ever even get much CDT Inc. stock remains to be
 18 seen. *Id.* ¶¶ 26-29.⁵

19 d. **CDT Inc. has not fraudulently sought to escape liability for Opsys’ debts.**

20 CDT Ltd. acquired control of Opsys UK in 2002 to gain access to IP potentially
 21 useful to CDT Ltd.’s business. CDT Inc. purchased the stock of Opsys in 2004 to obtain
 22 Opsys’ 84% interest in Opsys UK. There was nothing fraudulent about these transactions.

23 _____
 24 ⁵ CDT Inc. is not a mere continuation of Opsys for the additional reason that Opsys’
 25 assets were transferred to Opsys UK and then, arguably, to CDT Ltd.—not CDT Inc.
 26 *See Maloney*, 207 Cal. App. 3d 282, 288 (1988) (“a mere continuation contemplates a
 27 direct sale of assets from the predecessor corporation to the successor corporation”) (emphasis added); *Katzir’s*, 349 F.3d at 1151 (holding that corporation was not mere
 28 continuation of judgment debtor where it had obtained the assets of the judgment debtor from an intervening corporation, although this intervening corporation was wholly owned by the wife of the sole shareholder of both the alleged successor corporation and the judgment debtor).

1 Opsys received ample consideration for its UK assets.⁶ Black Decl. ¶ 11.

2 The structure of these transactions reflected legitimate business reasons and sound
3 tax planning, not a plan to defraud creditors. A simpler structure, such as an asset purchase,
4 would have created tax liability that Opsys probably could not have paid—a significant
5 barrier to completing the transaction. Black Decl. ¶ 8. Creating new unpaid tax obligations
6 would have done nothing for Opsys' creditors.

7 The Transaction Agreement and Amended Settlement Agreement explicitly
8 provided for the satisfaction of all of Opsys' identified liabilities, as well as providing for
9 contingent liabilities and unidentified liabilities. See part II.D above; Black Decl. ¶¶ 26-29.
10 CDT Inc. did not purchase Opsys' stock to escape liability for Plaintiff's claim because
11 CDT Inc. did not even know about Plaintiff's claim. Plaintiff cites no authority for its
12 argument that CDT Inc. should not have been permitted to acquire the UK assets of Opsys
13 without assuming liability for Opsys' US operations. See Mot. 21:7-13. The rule is to the
14 contrary. It is well settled that, absent one of the four exceptions enunciated in *Ray*, a
15 corporation that purchases the assets of another corporation does *not* assume the selling
16 corporation's liabilities. *Ray*, 19 Cal. 3d at 28. Here, none of the four exceptions applies.

17 C. **Plaintiff's motion under Rule 69(a) should be denied.**

18 Plaintiff argues that Rule 69(a) allows it to rely on California Code of Civil
19 Procedure section 187, which courts have interpreted to permit the amendment of a
20 judgment to add judgment debtors under certain circumstances. Doing this requires
21 "(1) that the new party be the alter ego of the old party *and* (2) that the new party had
22 controlled the litigation, thereby having had the opportunity to litigate, in order to satisfy
23 due process concerns." *Katzir's*, 394 F.3d at 1148 (citations and internal quotations
24 omitted); *McClellan v. Northridge Park Townhome Owners Ass'n, Inc.*, 89 Cal. App. 4th

25
26 ⁶ Plaintiff cites California's Uniform Fraudulent Transfer Act (Mot. 22:103), which
27 explicitly considers whether a debtor received "reasonably equivalent value" for the asset
28 transferred. See Cal. Civ. Code §§ 3439.04(a)(2) & (b)(8); see also *id.* § 3439.08 (a
transfer is not voidable against a person who took in good faith and for a reasonably
equivalent value or against any subsequent transferee).

1 746, 752 (2001). Section 187 has also been applied to permit the addition of successors in
2 interest, as well as alter egos, to a judgment. *Id.* at 753-55.

3 Here, none of these requirements is satisfied. As shown above, CDT Inc. is not a
4 successor in interest to Opsys. It also is not the alter ego of Opsys, its third-tier subsidiary.
5 Plaintiff has not even begun to make the showing necessary to pierce the corporate veil
6 between Opsys and Opsys UK, much less the one separating those two corporations from
7 CDT Ltd., CDT Ltd. from CDT Holdings Limited, and CDT Holdings Limited from CDT
8 Inc. Nor has there been any failure to observe corporate formalities. Opsys UK has
9 employees, books of accounts and bank accounts separate from those of CDT Inc. and CDT
10 Ltd. Black Decl. ¶ 15. Its employees use different laboratories than CDT Ltd.'s
11 employees. Fyfe Decl. ¶ 10. CDT Ltd., Opsys and Opsys UK all have their own audited
12 accounts. Each maintains its own share register. Each has its own General Ledger. Each
13 has its own board of directors. No member of CDT Inc.'s board has ever sat on the boards
14 of Opsys or Opsys UK, nor have the principals in Opsys sat on the boards of CDT Inc.
15 Black Decl. ¶¶ 15-17. Plaintiff concededly is *not* alleging that CDT Inc. is an alter ego of
16 Opsys with respect to breach of the Fremont lease. *See* Mot. 13 n.24 & 16 n.29. In no way
17 has Plaintiff made an alter ego showing, much less one that would pierce through the three
18 layers from a third-tier subsidiary to the ultimate parent.

19 Contrary to Plaintiff's bare assertion, no entity other than Opsys has directed Opsys'
20 defense of this litigation. The suggestion that CDT Inc. has directed Opsys' defense is
21 demonstrably wrong. Black Decl. ¶¶ 39-49. Plaintiff mentions Dr. Fyfe's attendance at a
22 settlement conference but neglects to mention that Plaintiff asked that a representative of
23 CDT Inc. attend the meeting. Fyfe Decl. ¶ 13. Dr. Fyfe and Mr. Chiu did not speak again
24 following that meeting. *Id.*

25 CDT Inc. has taken an interest in the litigation not only because Opsys is a
26 subsidiary of CDT Ltd. (and hence an indirect third-tier subsidiary of CDT Inc.) but also
27 because Plaintiff named CDT Ltd. in its original complaint and in its first amended
28 complaint, and because Plaintiff moved to add CDT Inc. as a party in November 2005.

1 CDT Inc. (and CDT Ltd.) did not direct the day-to-day defense of Plaintiff's claim. Fyfe
 2 Decl. ¶ 12; Black Decl. ¶ 32. Mr. Fields (an in-house lawyer for CDT Inc.) attended the
 3 trial because of Plaintiff's attempts to sue CDT Inc. and CDT Ltd. and because Opsys'
 4 representative Mr. Black was excluded from the first six days of trial as a potential witness.
 5 Black Decl. ¶¶ 46-49.

6 Plaintiff cites cases that supposedly impose liability on a corporation solely on the
 7 ground that it controlled the litigation for the defendant. *See* Mot. 12:17-25 & 13:3-5 &
 8 n.22. But none supports Plaintiff's position here. In *Koehler v. Bank of Bermuda Ltd.*,
 9 No. M18-302, 2002 WL 1766444 (S.D.N.Y. July 31, 2002), the court denied a Rule 25(c)
 10 motion to join or substitute as an additional judgment debtor a bank that had transferred
 11 some of the original judgment debtor's assets to its own account, allegedly in satisfaction of
 12 outstanding debts. There was no claim that the bank had controlled the litigation. *Koehler*
 13 mentions in passing that a corporation that acquires all of another corporation's assets
 14 without merging ordinarily is not liable for a judgment as a successor unless it controlled
 15 the litigation that resulted in the judgment. *Id.* at *3. This observation is dicta.

16 Both *Expert Electric, Inc., v. Levine*, 554 F.2d 1227 (2d Cir. 1977), and *TRW, Inc.*,
 17 *v. Ellipse Corp.*, 495 F.2d 314 (7th Cir. 1974), applied res judicata to determine whether
 18 appellants were bound by the results in prior proceedings. They did not hold that a
 19 corporation could be added to the judgment in an action to which it was not a party.

20 In *Oyakawa v. Gillett*, 8 Cal. App. 4th 628 (1992), the court of appeal reversed an
 21 order granting a motion under section 187 to add a judgment debtor's wife as an additional
 22 judgment debtor, reasoning that the wife was not the husband's alter ego and had not
 23 controlled the litigation.⁷

24 In *Troy Co. v. Products Research Co.*, 339 F.2d 364 (9th Cir. 1964), the district
 25 court found that the defendant, Troy, was only a nominal defendant, and that another entity,

26 _____
 27 ⁷ Plaintiff's assertion that *Oyakawa* approved of the order amending the judgment and
 28 that the "new defendant [had been] represented by the original defendant's representation
 at trial" (Mot. 13 n.22) is wrong.

1 Danville, was principally responsible for the litigation. *Id.* at 366. Danville, however, was
2 significantly more involved in the litigation than CDT Inc. here. *Troy* was a patent
3 infringement suit; Danville manufactured the allegedly infringing device, prepared exhibits,
4 designated all prior art references, indemnified Troy and conducted settlement negotiations
5 without Troy's knowledge. *Id.* at 367. There was no issue of adding or substituting
6 Danville as a judgment debtor. *Id.* at 368.

7 In sum, neither *Troy* nor any of the other cases cited by Plaintiff supports its
8 argument that controlling the litigation of an action alone is sufficient to justify the
9 imposition of liability in that litigation.

10 **D. Plaintiff's claim against CDT Inc. is barred by laches.**

11 Even if Plaintiff's claim against CDT Inc. had any merit—which, as demonstrated
12 above, it does not—Plaintiff's motion should nevertheless be denied because its claim is
13 barred by laches. Laches “addresses delay in the pursuit of a right when a party must assert
14 that right in order to benefit from it.” *Hot Wax, Inc. v. Turtle Wax, Inc.*, 191 F.3d 813, 820
15 (7th Cir. 1999). To demonstrate laches, a defendant must prove “unreasonable delay by the
16 plaintiff and prejudice to itself.” *Danjaq LLC v. Sony Corp.*, 263 F.3d 942, 951 (9th Cir.
17 2001) (citation omitted). Because laches is an equitable defense (*id.* at 950), it may
18 properly be asserted against an equitable doctrine such as successor liability. *See Katzir's*,
19 394 F.3d at 1149 (holding that proceedings under Civ. Proc. Code § 187 are equitable).
20 Both of the requirements for laches are satisfied here.

21 *Unreasonable delay:* Although Plaintiff received no rent payments after November
22 1, 2002 (Pl.'s 2d Am. Compl. ¶ 17, Dkt. 58), it waited two years until December 14, 2004
23 to file its complaint—the day before CDT Inc.'s IPO. CDT Inc. filed its registration
24 statement on July 30, 2004. Plaintiff knew about the planned IPO by November 2004,
25 when Damoder Reddy faxed him information about the IPO and suggested that he file suit.
26 Mr. Chiu asked Mr. Reddy to refer him to an attorney; Mr. Reddy introduced Mr. Chiu to
27 Stanley Hilton, Plaintiff's first counsel in this case. Hayashi Decl. ¶ 2, Ex. A (Chiu Dep.
28 293:24-295:5, Ex. 46) & ¶ 3, Ex. B (Reddy Dep. 19:9-20:17, 136:7-137:6). Plaintiff sat

1 silent while CDT Inc. priced its IPO and went to market. Black Decl. ¶ 23. Plaintiff sat
 2 silent while CDT Inc. acquired all of Opsys' stock, allowing Opsys to exercise the Opsys
 3 Limited Option. *Id.* ¶ 24. All this time, Plaintiff sat on its rights. It did not serve its
 4 complaint until January 10, 2005, well after the IPO and the completion of the 2004
 5 transaction. *See* Notice of Removal, Ex. A (summons and complaint) (Dkt.1). If Plaintiff
 6 had promptly asserted its claim, then CDT Inc. would have known that Opsys' liabilities
 7 exceeded the \$1.25 million cap set in the Transaction Agreement, CDT Inc. would not have
 8 purchased Opsys' stock and Plaintiff would not have had a theory for suing CDT Inc.—
 9 which is undoubtedly why Plaintiff did not act sooner.

10 Hence, the first requirement for laches—unreasonable delay—is satisfied. “In
 11 determining reasonableness, courts look to the cause of the delay.” *Danjaq*, 263 F.3d at
 12 954. Here, Plaintiff waited to act until it had what it hoped would be a deep pocket.

13 *Prejudice*: The second requirement for laches—prejudice—also is met. A
 14 defendant may demonstrate prejudice by showing that it “took actions or suffered
 15 consequences that it would not have, had the plaintiff brought suit promptly.” *Id.* at 955. If
 16 Plaintiff had acted promptly here, CDT Inc. would not have bought Opsys' stock and would
 17 not now be facing a motion to add it to a \$5 million judgment against Opsys. This is
 18 prejudice by any definition. Plaintiff's counsel himself commented in court that CDT Inc.
 19 might have an equitable defense based on Plaintiff's inaction. *See* Dkt. 198, at 7:6-8.

20 E. **Leave to add a fraudulent conveyance claim should be denied.**

21 Plaintiff notice of motion seeks leave to add a claim under Rule 18(b) for fraudulent
 22 conveyance of Opsys' assets to CDT Inc. and to CDT Oxford. Mot. 1:12-13. Elsewhere,
 23 however, Plaintiff seeks leave to file this claim only “if needed” (*id.* 2:13-14), stating that it
 24 “may also seek leave to file a supplemental claim for relief for fraudulent conveyance
 25 against Cambridge and CDT Oxford Limited” (*id.* 23:6-7) (emphasis added).

26 Plaintiff apparently claims that CDT Inc.'s transfer of Opsys' 84% interest in Opsys
 27 UK to CDT Ltd. in May 2005 was fraudulent. *In May 2005, however, CDT Ltd. was a*
 28 *defendant in this litigation.* The order dismissing CDT Ltd. with prejudice was not entered

1 until August 8, 2005. *See* Dkt. 39. One does not avoid liability by transferring assets from
2 one party defendant (Opsys) to another (CDT Ltd.). There is no ground to assert that this
3 transaction defrauded anybody, or was intended to do so. Black Decl. ¶¶ 33-38. The
4 transfer of assets from Opsys to CDT Ltd. was planned well before the filing of Plaintiff's
5 complaint—before CDT Inc. knew of Plaintiff's claim—to simplify CDT Inc.'s corporate
6 structure. *Id.* Contrary to Plaintiff's claims (Mot. 21:13-16), the 84% interest in CDT
7 Oxford that Opsys transferred to CDT Ltd. had little value because CDT Ltd. had been
8 entitled to 98% of CDT Oxford's profits since 2002. Black Decl. ¶ 36.

9 Possibly Plaintiff will dispute that CDT Ltd. was the defendant named in its original
10 complaint and its first amended complaint and claim it meant all along to sue CDT Inc.
11 After all, Plaintiff described the CDT entity named in its original complaint as a British
12 company that was the owner of Opsys. Dkt. 1, ¶ 2. On the date Plaintiff filed its complaint,
13 CDT Inc. owned 16% of Opsys UK; CDT Ltd. did not own any stock in Opsys or Opsys
14 UK. Thus, the only CDT entity that owned any part of Opsys was CDT Inc., not CDT Ltd.

15 If this is Plaintiff's theory, then its Rule 18 motion must be denied because that
16 defendant—CDT Inc.—was dismissed with prejudice in August 2005. Dkt. 39.

17 Plaintiff's request to add a fraudulent conveyance claims also fails on procedural
18 grounds. Rule 18(b) provides that "a plaintiff may state a claim for money and a claim to
19 have set aside a conveyance fraudulent as to that plaintiff, without first having obtained a
20 judgment establishing the claim for money." But Plaintiff has filed no claim for money
21 against either CDT Inc. or Opsys UK. Plaintiff has cited no authority permitting it to
22 piggyback a fraudulent conveyance claim on top of a successor liability claim under
23 Rule 25(c) or Rule 69(a). Because Plaintiff has declined to file a complaint against CDT
24 Inc., there is no pleading to which a fraudulent conveyance claim may be added, much less
25 a pleading that would satisfy the heightened pleading standards of Rule 9(b). Having not
26 even lodged a proposed complaint, Plaintiff has not begun to comply with these rules.

27 **IV. CONCLUSION.**

28 The Court should deny outright Plaintiff's motion to add CDT Inc. as a party to this

1 action and to the judgment to be entered against Opsys. If, however, the Court believes that
2 Plaintiff has alleged enough to go forward, the Court should hold an evidentiary hearing on
3 the matter. If the Court grants Plaintiff's request for discovery on successor liability issues,
4 CDT Inc. requests that the Court permit the parties to file motions for summary judgment
5 on Plaintiff's successor liability claim following the close of discovery.

6 Dated: May 7, 2007.

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RJN 234

EXHIBIT T

E-Filing

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SUNNYSIDE DEVELOPMENT COMPANY, LLC.,

No. C 05-00553 MHP

Plaintiff,

v.

OPSYS LIMITED, a United Kingdom Company,


Defendant.

JUDGMENT
(Fed.R.Civ.P. 58)

This action came on for trial before the court, the Honorable Marilyn Hall Patel, United States District Judge, presiding, and the issues having been duly tried before a jury and the jury having duly rendered its verdict,

IT IS HEREBY ORDERED AND ADJUDGED that plaintiff, SUNNYSIDE DEVELOPMENT COMPANY, LLC., recover of the defendant OPSYS LIMITED, the sum of \$4,853,017.00, with interest thereon at the rate of 4.95 percent as provided by law, and its costs of action.

Date: May 29, 2007


MARILYN HALL PATEL
District Judge
United States District Court
Northern District of California

RJN 235

Exhibits U-W to Request for Judicial Notice

EXHIBIT U

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE MARILYN HALL PATEL, JUDGE

SUNNYSIDE DEVELOPMENT
COMPANY,

PLAINTIFF,

VS.

OPSYS, LTD.

DEFENDANT.

NO. C 05-553 MHP

SAN FRANCISCO, CALIFORNIA
WEDNESDAY, MAY 16, 2007

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

FOR PLAINTIFF:

BARTKO ZANKEL TARRANT & MILLER
900 FRONT STREET
SUITE 300
SAN FRANCISCO, CA 94111

BY: ROBERT H. BUNZEL
ALYSON L. HUBER
BRIAN VILLAREAL
ATTORNEYS AT LAW

FOR DEFENDANT:

ORRICK HERRINGTON & SUTCLIFFE
THE ORRICK BUILDING
405 HOWARD STREET
SAN FRANCISCO, CA 94105

BY: JAMES E. BURNS, JR.
JUSTIN MYER LICHTERMAN
ATTORNEYS AT LAW

(APPEARANCES CONTINUED ON FOLLOWING PAGE)

REPORTED BY:

JAMES YEOMANS, CSR #4039, RPR
OFFICIAL REPORTER

COMPUTERIZED TRANSCRIPTION BY ECLIPSE

RJN 236

APPEARANCES: (CONTINUED)

FOR DEFENDANT: PILLSBURY WINTHROP
2550 HANOVER STREET
PALO ALTO, CA 94304-1115
BY: BRUCE ERICSON
SHARON O'GRADY
ALICE KWONG MA HAYASHI
ATTORNEYS AT LAW

RJN 237

1 WEDNESDAY, MAY 16, 2007

11:00 A.M.

2 (THE FOLLOWING PROCEEDINGS WERE HEARD IN OPEN COURT:)

3 THE COURT: NOW, YOU CALL THE OTHER CASE. I'M SORRY,
4 I DIDN'T REALLY -- JUST CALLED ONE OF THEM.

5 THE CLERK: CIVIL 05-0553, SUNNYSIDE DEVELOPMENT
6 COMPANY VERSUS OPSYS LIMITED.

7 MR. BUNZEL: ROBERT BUNZEL, ALYSON HUBER ON BEHALF OF
8 THE PLAINTIFF.

9 THE COURT: GOOD AFTERNOON.

10 MR. BURNS: GOOD AFTERNOON AGAIN.

11 JAMES BURNS AND JUSTIN LICHTERMAN FOR DEFENDANT OPSYS
12 LIMITED.

13 THE COURT: GOOD AFTERNOON.

14 MR. ERICSON: GOOD AFTERNOON.

15 BRUCE ERICSON, SHARON O'GRADY AND ALICE HAYASHI FOR
16 NON-PARTY CAMBRIDGE DISPLAY TECHNOLOGY, INC.

17 THE COURT: AND HOPING TO KEEP IT THAT WAY.

18 MR. ERICSON: YES.

19 THE COURT: OKAY. LET ME ASK YOU ABOUT SOME THINGS
20 BEFORE WE GET TO THAT.

21 I THINK, THE BEST ORDER IN WHICH TO TAKE THESE, IS
22 PROBABLY ON THE MOTION FOR NEW TRIAL AND SO FORTH, SO WHOSE
23 GOING TO ADDRESS THAT?

24 MR. BURNS: I WILL, YOUR HONOR.

RJN 238

25 THE COURT: YOU ARE. AND?

1 MR. BUNZEL: I AM.

2 THE COURT: AND PLAINTIFFS YOU ARE. WHY DON'T YOU
3 BOTH GET UP HERE, SO NEITHER ONE OF YOU GETS TOO COMFORTABLE.

4 IN ANY EVENT, THE INCONSISTENT VERDICT ISSUE, ISN'T
5 THAT PROPERLY RAISED ON UNDER 59(A)?

6 MR. BURNS: IT IS PROBABLY A 59(A), RULE 59 MOTION.

7 THE COURT: AND YOU AGREE WITH THAT, RIGHT?

8 MR. BUNZEL: YES, YOUR HONOR. I DON'T BELIEVE IT FITS
9 UNDER RULE 50.

10 THE COURT: THERE WAS NO 50(A) MOTION YOU COULD MAKE
11 GIVEN --

12 MR. BURNS: WE PRESERVED ALL OF OUR MOTIONS, IF YOU
13 RECALL.

14 THE COURT: YOU PRESERVED EVERYTHING, EVEN THINGS
15 YOU'RE NOT ENTITLED TO YOU PRESERVED.

16 MR. BURNS: THAT'S RIGHT, EXACTLY. I THINK, THIS IS A
17 CLASSIC NEW TRIAL MOTION.

18 THE COURT: THIS IS A 59, RULE 59 MOTION, BUT THEN
19 TAKING IT FROM THERE, THERE'S CERTAINLY -- THERE WERE QUESTIONS
20 REGARDING THE QUESTIONS THAT WERE PROPOUNDED TO THE JURY IN THE
21 SPECIAL INTERROGATORIES. RJN 239

22 BUT, AND I HAVE TO SAY, LOOKING AT THE TRANSCRIPT,
23 THAT MY ANSWERS TO THEM WERE SOMEWHAT GARBLED, BUT I THINK THAT
24 NONETHELESS THEY QUOTE THE PICTURE AND IT WAS MADE CLEAR THAT
25 WHATEVER THEY BELIEVED HAPPENED WITH REGARD TO THE ASSIGNMENT

1 AND WHETHER OR NOT THE ASSIGNMENT WAS SIGNED AND WHETHER IT
2 EVER BECAME EFFECTIVE, THAT ITS EFFECTIVE DATE WAS PREMISED
3 UPON THE SATISFACTION OF CERTAIN CONDITIONS, CORRECT?

4 AND THAT WAS EXPLAINED TO THEM, I THINK, IN THE --
5 WITH MY SOMEWHAT INARTICULATE EXPLANATIONS, BUT THEY UNDERSTOOD
6 THAT AND UNDERSTOOD THAT, IN FACT, WHILE THE DOCUMENT MAY HAVE
7 BEEN DRAFTED AND IN THE POSSESSION OF THE PARTIES, IT WOULD NOT
8 TAKE EFFECT UNTIL THOSE CONDITIONS HAD BEEN MET.

9 AND THEY DETERMINED IT HAD NOT BECOME EFFECTIVE, BUT I
10 ALSO EXPLAINED TO THEM THAT DURING THAT PERIOD OF TIME IT MAY
11 OR MAY NOT HAVE BECOME EFFECTIVE. IT COULD HAVE BECOME
12 EFFECTIVE ANYTIME WITHIN THAT 90 DAYS.

13 BUT QUESTION WAS WHETHER OR NOT DURING THAT PERIOD OF
14 TIME ANY KIND OF REPRESENTATIONS OR MISREPRESENTATIONS WERE
15 MADE, ET CETERA. AM I CORRECT?

16 MR. BUNZEL: FROM THE PLAINTIFF'S PERSPECTIVE VERY
17 MUCH SO. ON PAGE 9 OF THE TRANSCRIPT FROM MARCH 9TH, I THINK,
18 CONFIRMS THAT ANALYSIS.

19 MR. BURNS: WELL, THE RUB, OF COURSE, IS THAT THE
20 QUESTION NUMBER ONE AS THE PLAINTIFF NOW CONCEDES WAS PUT IN
21 THERE AT -- IN AID OF THE COURT'S JURISDICTION ON RESCISSION.

22 I'M QUOTING FROM THEIR BRIEF AND OTHER THINGS THAT
23 THEY SAID, WHATEVER THAT HAPPENS TO MEAN. AND QUESTION NUMBER
24 TWO GOES TO THE QUESTION OF WHETHER THE ASSIGNMENT EVER BECAME
25 EFFECTIVE. I.E., WHETHER THE LIABILITY WAS PASSED.

RJN 240

1 SO WHAT WE'RE DEALING WITH HERE IS THE BASIC
2 INCONSISTENCY OF THOSE TWO POSITIONS. BECAUSE IF THERE'S
3 RESCISSION YOU HAVE AN EFFECTIVE CONTRACT WHICH YOU ARE
4 AVOIDING.

5 THE COURT: BUT THE TERM RESCISSION WAS NEVER
6 MENTIONED TO THE JURY OR ANYTHING.

7 MR. BURNS: NO, THAT'S TRUE. YOU'RE ABSOLUTELY
8 CORRECT, BUT THAT'S THE BASIS FOR THAT QUESTION, WE KNOW
9 BECAUSE THAT'S WHAT THE PLAINTIFFS HAVE SAID AND WHAT THE COURT
10 SAID WHICH -- AND I THINK THE COURT INSTRUCTED THE JURY
11 CORRECTLY ON THEIR QUESTION ON THE LAST DAY OF TRIAL.

12 ON PAGE 10 AND 11 THE COURT SAID:

13 "I DON'T KNOW HOW IT COULD BE DONE ANY DIFFERENT," I'M
14 PARAPHRASING HERE TO TRY TO MAKE IT CORRECT ENGLISH, WOULD HAVE
15 TO BE SOME TIME WITHIN THAT PERIOD OF TIME, ALTHOUGH THE
16 LANGUAGE SAYS, "AT THE TIME OF THE EFFECTIVE DATE OF THE
17 ASSIGNMENT".

18 "THE PROBLEM WITH THAT IS, HOWEVER, THAT IT COULD
19 BECOME EFFECTIVE SOME TIME EARLIER THAN 90 DAYS.

20 MR. BURNS: "EXACTLY".

21 "YOU DON'T HAVE ANY DISPUTE WITH THAT?"

RJN 241

22 MR. BURNS: "EXACTLY."

23 THEN IT GOES ONTO SAY, THE COURT COULD HAVE BEEN, AND
24 AGAIN WE'RE STILL TALKING TO THE JURY, COULD HAVE BEEN
25 EFFECTIVE EARLIER, IT COULD HAVE BEEN AFFECTED AT THE TIME --

1 -- EXCUSE ME -- IT COULD HAVE BEEN AT THE TIME IT BECAME
2 EFFECTIVE OR THE DATE WHICH IT WAS TO BECOME EFFECTIVE.

3 AND BUT AFTER 90 DAYS, YOU'RE GOING TO READ THE REST
4 OF THIS SECTION TO KNOW THAT, IN THE EVENT NOT ALL THE
5 CONDITIONS PRECEDENT HAVE BEEN SATISFIED AND 90 DAYS HAVE
6 PASSED, THEN THE ASSIGNMENT IS NULL AND VOID.

7 SO THAT I'M GIVING JUST PART OF THE INSTRUCTIONS THAT
8 THE COURT GAVE IN ANSWER TO THE QUESTION, BUT THEN THE JURY
9 CAME BACK AND SAID, WERE THERE MATERIAL MISREPRESENTATIONS?

10 AGAIN, MATERIAL WAS NEVER DEFINED, BUT WERE THERE
11 MATERIAL MISREPRESENTATIONS AT THE TIME IT WAS ENTERED INTO?
12 NO. AND THEN B IS AT THE EFFECTIVE DATE OF THE ASSIGNMENT.

13 SO THE COURT READ THE ASSIGNMENT, READ PARAGRAPH TWO,
14 AS I RECALL, YES, PARAGRAPH TWO OF THE ASSIGNMENT, WHICH TALKS
15 ABOUT THE EFFECTIVE DATE AND THE EFFECTIVE DATE IS WHEN ALL THE
16 CONDITIONS PRECEDENT HAVE BEEN DONE, WHEN THE RELEASE IS
17 EFFECTIVE, WHEN EVERYTHING ELSE IN THE ASSIGNMENT IS EFFECTIVE.

18 AND THEY SAID, YES, YOU CANNOT ANSWER THAT QUESTION
19 WITHOUT FIRST DETERMINING THAT THERE WAS AN EFFECTIVE DATE
20 BECAUSE, AS THE COURT SAID, IF IT GOES BEYOND THE 90 DAYS IT'S
21 NULL AND VOID. AND SO IN PARAGRAPH TWO, IN ESSENCE, THEY SAY
22 OR QUESTION NUMBER TWO, IN ESSENCE, THEY SAY IT'S NOT
23 EFFECTIVE. RJN 242

24 SO, I MEAN, THIS AS FAR AS WE'RE CONCERNED WAS INVITED
25 BY THE PLAINTIFF OVER OUR OBJECTION, BUT YOU HAVE DIAMETRICALLY

1 OPPOSED DETERMINATIONS, A, IT WAS EFFECTIVE AND, B, IT WASN'T
2 EFFECTIVE.

3 AND, I THINK, THEREIN IS THE RUB AND IT'S SORT OF IN
4 BLACK AND WHITE, NOT A WHOLE LOT WE CAN DO ABOUT IT.

5 THE COURT: ONLY IF YOU IGNORE ALL THE INSTRUCTIONS
6 THEY WERE GIVEN WHEN THEY ASKED THE QUESTION, AND THE QUESTION
7 WAS ANSWERED AND I THINK THAT, YOU KNOW, IT'S NOT A SITUATION
8 WHERE THEY WALKED OUT OF HERE AND YOU END UP WITH A VERDICT
9 FORM WITH TWO INCONSISTENT ANSWERS.

10 IT'S A SITUATION WHERE THEY WERE GIVEN FURTHER
11 INSTRUCTIONS AND THEY ANSWERED THAT QUESTION IN ACCORDANCE WITH
12 THOSE INSTRUCTIONS. AT LEAST, WE HAVE TO ASSUME THEY DID AND
13 THAT RESOLVES ANY CONFLICT, I THINK, FOR INCONSISTENCY.

14 MR. BURNS: THE INSTRUCTIONS GIVEN BY THE COURT, AS I
15 SAY, WE BELIEVE WERE CORRECT, IS THAT THE EFFECTIVE DATE IS THE
16 EFFECTIVE DATE IN THE ASSIGNMENT, AND SO TO ANSWER THAT
17 QUESTION, WHICH THE JURY DID --

18 THE COURT: TO BE DETERMINED, YOU KNOW, HAD TO HAPPEN
19 WITHIN A CERTAIN DATE, BUT IT DIDN'T, DOESN'T MEAN IT
20 NECESSARILY OCCURRED.

21 MR. BURNS: WELL, BUT THE COURT ACTUALLY ADDRESSED
22 THAT ISSUE. SAID IT COULD HAVE BEEN ANYTIME WITHIN THE 90
23 DAYS.

RJN 243

24 THE COURT: THAT'S RIGHT.

25 MR. BURNS: THAT'S THE EFFECTIVE DATE. SO, I GUESS,

1 I'M JUST SAYING --

2 THE COURT: IT COULD HAVE BEEN THE EFFECTIVE DATE IF
3 IT HAD BEEN AFFECTED.

4 MR. BURNS: I'M NOT SURE ABOUT THAT. BUT YOU CAN'T
5 FIND, I WOULD SIMPLY SUBMIT TO THE COURT, YOU CAN'T FIND THAT
6 THERE WAS AN EFFECTIVE DATE OF THE ASSIGNMENT AND THE
7 ASSIGNMENT WAS NOT EFFECTIVE.

8 THE COURT: I THINK, THAT'S SUFFICIENTLY EXPLAINED BY
9 THE INSTRUCTIONS, THEY ACTED IN ACCORDANCE, I TRUST, IF YOU
10 TAKE THIS UP ON APPEAL, THAT YOU WILL, IN FACT, GIVE THE COURT
11 THE BENEFIT OF THE INSTRUCTIONS THAT WERE GIVEN TO THE JURY.

12 MR. BURNS: ABSOLUTELY.

13 THE COURT: AND --

14 MR. BUNZEL: DO YOU NEED ANYTHING FURTHER FROM THE
15 PLAINTIFF ON THAT ISSUE?

16 THE COURT: I DON'T THINK SO, NOR ON THE REST OF
17 THESE.

18 WE DEALT WITH WAIVER. HOW MANY TIMES HAVE WE DEALT
19 WITH WAIVER ON THIS CASE? SEVERAL TIMES, ON THE MOTION FOR
20 SUMMARY JUDGMENT, AND THEN, YOU KNOW, THE EQUITABLE ESTOPPEL
21 ONLY THING SORT OF LEFT UNTIL THE END.

22 AND THEN THERE'S SOME ARGUMENT MADE ABOUT THIS LETTER
23 FROM MR. CHIU TO WHOMEVER IT WAS, SO FORTH, BUT THAT WAS NOT
24 ADMITTED TO CHANGE THE TERMS NOR INTEND TO CHANGE THE TERMS OF
25 THE ASSIGNMENT, IT WAS ADMITTED TO SHOW EITHER THERE WAS A LACK

RJN 244

1 OF, YOU KNOW, IGNORANCE OR -- LACK OF IGNORANCE OR INTENT OR
2 LACK OF INTENT, RIGHT?

3 RELIANCE, LACK OF RELIANCE AND THAT SEPARATE AND APART
4 FROM THE TERMS OF THE ASSIGNMENT.

5 AND THEN UNCLEAN HANDS, YOU KNOW, YOU SAID THERE'S
6 AMPLE EVIDENCE, BUT YOU DIDN'T CITE TO ANY SPECIFIC AND I DON'T
7 KNOW WHAT THAT MEANS.

8 I GUESS, MEANS YOU THINK IT'S SO OBVIOUS I SHOULD
9 RECOGNIZE IMMEDIATELY, BUT I DON'T BECAUSE I DON'T SEE THAT
10 THERE IS REALLY EVIDENCE OR IF THERE IS ANY, IT'S VERY SCANT.

11 CERTAINLY NOT SUFFICIENT TO GIVE IT TO THE JURY, THAT
12 THE PLAINTIFF INTENDED TO OBTAIN OR KEEP ANY BENEFIT FROM THE
13 ASSIGNMENT, BUT THEN NEVER INTENDED TO HONOR IT, IN FACT.

14 OF COURSE, IN FACT, THE JURY FOUND IT NEVER BECAME
15 EFFECTIVE ANYWAY, SO.

16 MR. BURNS: THEY FOUND A LOT OF UNEFFECTIVENESS. I
17 WOULD SAY, YOUR HONOR, ON THIS, THAT I WOULD POINT OUT THAT
18 PLAINTIFF DEVOTES ONE PAGE OF ARGUMENT IN ITS BRIEF TO THE
19 INCONSISTENT VERDICT AND THEN JUMPS RIGHT INTO RESCISSION, BUT
20 IF THE COURT SHOULD THEN WE WANT TO RESCIND.

21 THE COURT: RESCISSION NO LONGER AN ISSUE, IS IT?
22 RIGHT?

23 MR. BURNS: I GUESS NOT, YOUR HONOR. ALTHOUGH, THAT
24 SEEMS TO BE THE FALLBACK AND THESE ARE, OBVIOUSLY, ALL
25 EQUITABLE DEFENSES, BUT I THINK THE COURT IS CORRECT, THAT WE

RJN 245

1 HAVE HASHED THESE OVER. WE MAY HAVE OUR DISAGREEMENTS, BUT I
2 THINK IT'S BEEN FULLY EXPLORED.

3 THE COURT: THAT'S WHAT THOSE THREE WISE HEADS ARE
4 FOR.

5 MR. BUNZEL: YOU'RE CORRECT ABOUT RESCISSION, YOUR
6 HONOR, AND I DON'T THINK WE SPENT A LOT OF TIME ON THAT IN OUR
7 BRIEF.

8 THE LAST PARAGRAPH OF THE BRIEF SAYS THAT RESCISSION
9 IS NO LONGER SOMETHING THAT'S REQUIRED TO BE DECIDED AT THIS
10 TIME BY THIS COURT.

11 THE COURT: DOES THAT MEAN IT'S NOT BEING SOUGHT?

12 MR. BUNZEL: AS I SAID AT THE END OF THAT SENTENCE,
13 YOUR HONOR, IN THE UNLIKELY EVENT THAT YOU THOUGHT THE VERDICT
14 WAS INCONSISTENT AND THAT QUESTION TWO WAS IMPAIRED, THEN YOU
15 WOULD PROBABLY -- WE WOULD ASK YOU TO DECIDE RESCISSION.

16 SINCE THAT'S NOT THE CASE WE'RE NOT ASKING YOU TO
17 DECIDE RESCISSION.

18 THE COURT: OKAY. NOW, YOU WANT TO DEAL WITH THE
19 ATTORNEYS' FEES ISSUES OR WITH THE CDT ISSUES?

20 MR. BURNS: YOUR HONOR, MR. LICHTERMAN WILL HANDLE THE
21 ATTORNEYS' FEES MOTION, IF THAT'S NEXT UP.

22 THE COURT: MAYBE THAT'S THE WAY WE SHOULD DO AND THEN
23 GO TO THE NEW ISSUE OF A QUOTE "NEW PARTY" OR ATTEMPT TO THEN.
24 MAYBE SOMEBODY BROUGHT DIAGRAMS OF EVERYTHING THAT HAPPENED ON
25 THE OTHER SIDE OF THE POND, AS THEY SAY.

RJN 246

1 ATTORNEYS' FEES, FIRST OF ALL, GET THE RIGHT
2 PARAGRAPH. DO I UNDERSTAND THAT YOU'RE RELYING -- DEFENDANTS
3 ARE RELYING UPON -- WELL, LET ME PUT IT THIS WAY:

4 DEFENDANTS ARE RELYING UPON, I GUESS, THE LAST
5 SENTENCE OR SO OF THE PARAGRAPH ABOUT ATTORNEY'S FEES AND
6 PREVAILING PARTY?

7 MR. LICHTERMAN: I'M SORRY, YOUR HONOR.

8 THE COURT: THE LAST PARAGRAPH B?

9 MR. LICHTERMAN: IN ADDITION?

10 THE COURT: IN ADDITION, RIGHT.

11 MR. LICHTERMAN: NO, YOUR HONOR. I THINK, WE'RE
12 READING THE WHOLE PARAGRAPH AS A WHOLE, APPLYING JUST BASIC
13 CONTRACT INTERPRETATION PRINCIPLES, WHICH IS THE APPROPRIATE
14 WAY UNDER SETTLED CALIFORNIA CASE LAW TO ANALYZE AN ATTORNEY'S
15 FEES PROVISION.

16 I THINK, WHERE THIS STARTS, I THINK, EVERYBODY AGREES,
17 UNDER CALIFORNIA LAW THERE'S NO RIGHT TO ATTORNEYS' FEES. IT
18 ALL TURNS ON WHAT IS THE PROVISION IN THE CONTRACT.

19 THE COURT: RIGHT.

20 MR. LICHTERMAN: WHAT DOES IT SAY.

21 THE COURT: THAT'S WHERE WE ARE, THAT'S WHY I JUST
22 JUMPED RIGHT TO THE CONTRACT.

23 MR. LICHTERMAN: I THINK, AT THAT POINT YOU GOT TO
24 READ THE WHOLE PROVISION AS A WHOLE APPLYING BASIC CONTRACT
25 INTERPRETATION PRINCIPLES.

RJN 247

1 THE COURT: THEY'RE THE PREVAILING PARTY, RIGHT?

2 MR. LICHTERMAN: ON SOME ISSUES.

3 THE COURT: SO FAR.

4 MR. LICHTERMAN: ON SOME ISSUES.

5 THE COURT: ON A GOODLY NUMBER OF THEM. ON ENOUGH OF
6 THEM TO GET THEM A WHOOPING 400 SOME MILLION DOLLARS, WHATEVER
7 IT WAS.

8 MR. LICHTERMAN: I WILL CONCEDE THEY RECEIVED A
9 VERDICT FOR \$4.8 MILLION.

10 THE COURT: SO PREVAILING PARTY, SIGNIFICANTLY THE
11 PREVAILING PARTY, RIGHT?

12 MR. LICHTERMAN: BUT PREVAILING ON WHAT, YOUR HONOR?

13 I MEAN, THE CONTRACT -- THE LEASE IS VERY CLEAR AS TO
14 WHAT YOU HAVE TO PREVAIL ON AND WHAT SORT OF CLAIMS APPLY. AND
15 IT'S AN INTEGRATED AGREEMENT, WE CAN ONLY LOOK TO THE TERMS OF
16 THE AGREEMENT, NOT WHAT ANYONE THOUGHT, OR SAID, OR MAY THINK.

17 TO THE EXTENT THERE'S AMBIGUITY, WE KNOW FROM TRIAL
18 TESTIMONY MR. ROHAS HE'S THE GUY WHO HANDED OVER THIS STANDARD
19 FORM CONTRACT AND, I THINK, WHEN YOU START TO ANALYZE THE
20 LANGUAGE RATHER THAN JUST ASK WHO PREVAILED IN THE LAWSUIT --

21 THE COURT: WELL, WHO PREVAILED IN ENFORCING THE TERMS
22 OF THE CONTRACT?

23 MR. LICHTERMAN: NO ONE, YOUR HONOR. ABSOLUTELY NO
24 ONE ENFORCED THE TERMS OF THE CONTRACT. **RJN 248**

25 YOUR HONOR WILL RECALL WE HAD A HEATED DISPUTE OVER

1 THIS AT THE END OF THE TRIAL WITH RESPECT TO CALIFORNIA AND
2 CIVIL CODE 1951, AND IT WAS DEFENDANT'S POSITION THAT IF YOU'RE
3 ENFORCING THE CONTRACT YOU'RE NOT ENTITLED TO FUTURE RENT, YOU
4 HAVE TO WAIT FOR EACH CONSECUTIVE BREACH.

5 THAT'S THE CIVIL CODE AND IT WAS PLAINTIFF'S POSITION
6 THAT, NO, NO, NO, THIS IS TERMINATED, THERE'S NO CONTRACT TO
7 ENFORCE. NO ONE COMING BACK. WE JUST WANT OUR DAMAGES.

8 AND THE CIVIL CODE OUTLINES THAT IS NOT ENFORCEMENT
9 THAT IS TERMINATION. THAT IS SOMETHING VERY, VERY DIFFERENT
10 AND, I THINK, THAT'S A SIGNIFICANT DIFFERENCE. I THINK, IT'S
11 SIGNIFICANT THAT THE PARTIES ARGUED QUITE VOCIFEROUSLY ABOUT IT
12 IN FRONT OF THE COURT.

13 WE HAD OUR CIVIL CODES WE WERE HANDING THEM UP TO THE
14 COURT, THE COURT WILL RECALL AND THAT IS A DIFFERENCE AT LAW,
15 IT'S SUBSTANTIVE.

16 THE COURT: AS A MATTER OF FACT, I THINK, I STILL HAVE
17 SOMEBODY'S CIVIL CODE HERE.

18 MR. BUNZEL: THAT'S FINE, I WAS LOOKING FOR IT THE
19 OTHER DAY.

20 MR. LICHTERMAN: I THINK, THE IMPORTANT THING IT'S A
21 SUBSTANTIVE DIFFERENCE, LEGISLATURE MADE POINT OF SEPARATING
22 OUT TWO DIFFERENT METHODS OF DEALING WITH A BREACH. OKAY.

23 AND I DON'T THINK WE CAN, YOU KNOW, BECAUSE WE WANT TO
24 COLLECT ATTORNEYS' FEES, JUST CHANGE OUR MIND AND SAY NO, NO,
25 NOW WE'RE ENFORCING IT, THAT'S ALL.

RJN 249

1 AND THE ARGUMENT AT THE TIME, I REMEMBER QUITE
2 CLEARLY, WAS OPSYS LIMITED NOT COMING BACK, WE'RE TERMINATED,
3 IT'S TERMINATED, IT'S OVER, THERE'S NOTHING TO ENFORCE. IT'S
4 JUST A COLLECTION OF WHERE TO -- WE GET DAMAGES, EITHER
5 CONSEQUENTIAL, OR COMPENSATORY, OR SOMETHING ELSE, LIQUIDATED
6 OR WHATEVER IT WAS.

7 THE COURT: IS IT THAT OR IS IT A THEORY OF DAMAGES TO
8 WHICH YOU MAY BE ENTITLED AS A RESULT OF THE BREACH?

9 MR. LICHTERMAN: NO, YOUR HONOR. I THINK, THE CIVIL
10 CODE IS QUITE CLEAR ON THIS, THERE ARE TWO SEPARATE WAYS OF
11 DEALING WITH BREACHES OF A LEASE AGREEMENT.

12 ONE, IS ENFORCEMENT WHERE YOU GOT TO WAIT EACH MONTH
13 FOR YOUR RENT, THEN A SUBSEQUENT BREACH.

14 THE OTHER IS TERMINATION.

15 I DON'T THINK THERE'S EVEN ANY ROOM FOR DISCUSSION,
16 IT'S IN BLACK AND WHITE IN THE CIVIL CODE. WE ARGUED ABOUT IT
17 AND THE PLAINTIFFS TOOK THE POSITION THIS IS TERMINATION AND
18 THEY WERE ADAMANT, AND WE SAID, NO, IT'S NOT.

19 MR. BUNZEL: YOUR HONOR, ON THAT POINT, 1951.2 AND THE
20 ISSUE OF TERMINATION OF THE LEASE WAS USED AS THE APPROPRIATE
21 DAMAGE MODEL IN THE CASE, BECAUSE THE DEFENDANTS HAD ABANDONED
22 THE LEASE AND TERMINATED IT PURSUANT TO THE LANGUAGE OF 1951.2.
23 IT SAYS, THAT ABANDONMENT EQUALS TERMINATION. RJN 250

24 THERE WAS NEVER AN ARGUMENT MADE BY THIS PLAINTIFF
25 THAT THE TERMINATION OF THE LEASE WAS NOT AN ENFORCEMENT OF THE

1 LEASE AS TO DAMAGES, RATHER IF YOU LOOK AT THE CLEAR LANGUAGE
2 OF THE DAMAGE PROVISION IN THE LEASE AND ATTORNEYS' FEES GOES
3 TO ENFORCING THE TERMS OF THE LEASE.

4 IF YOU LOOK AT SECTION 13.2(A) AFTER DISCUSSION --
5 DISCUSSING TERMINATING LESSEES RIGHT TO POSSESSION, THE LEASE
6 PROVIDES THAT UNDER -- AFTER THAT THE LESSOR MAY RECOVER UNPAID
7 RENT THROUGH THE TERM OF THE LEASE THAT WAS TERMINATED.

8 THAT'S WHAT THE LEASE SAYS, THAT'S ALSO WHAT 1951.2
9 SAYS. WITH ALL RESPECT TO COUNSEL AND THE SEMANTICS HERE, IT'S
10 DIFFICULT TO FATHOM THAT IN THE COMMERCIAL STANDARD LEASE
11 CONTRACT THAT'S IN PLACE FOR TENS, IF NOT HUNDREDS OF THOUSANDS
12 OF BUILDINGS IN THIS JURISDICTION, THAT UPON A TERMINATED LEASE
13 UNDER THE CIVIL CODE THE PLAINTIFF CAN'T SEEK DAMAGES FOR
14 COLLECTING DEFAULTED RENT.

15 IT COMES CLOSE TO A RULE 11 QUESTION IN MY MIND, TO
16 MAKE THE ARGUMENT.

17 MR. LICHTERMAN: SINCE I'M BEING ACCUSED OF A RULE 11
18 VIOLATION I WOULD LIKE TO RESPOND.

19 THE COURT: ARE YOU GOING FOR BROKE THEN?

20 MR. LICHTERMAN: I JUST DON'T CONSIDER THE STATUTES,
21 THE CIVIL CODE TO BE SEMANTICS. I CONSIDER IT TO BE LAW. AND
22 THE LEGISLATURE HAS TWO SEPARATE PROVISIONS DEALING WITH TWO
23 SEPARATE WAYS OF DEALING WITH DAMAGES. RJN 251

24 ONE BASED ON ENFORCEMENT, ONE BASED ON TERMINATION.
25 THAT IS INTENTIONAL, THAT IS DELIBERATE, THAT IS SUBSTANTIVE

1 AND MEANINGFUL.

2 AND THEN WE GO LOOK AT A STANDARD COMMERCIAL LEASE,
3 AND I DON'T CARE HOW MANY OTHER LEASES THERE ARE THAT HAVE THIS
4 TERM, WE HAVE A DUTY AS OFFICER OF THE COURT AND AS A LEGAL
5 ISSUE TO ANALYZE THE TERMS OF THE CONTRACT, NOT WHAT 10,000
6 OTHER LEASES MIGHT MEAN AS STANDARD LEASES. AND THESE TERMS
7 TALK ABOUT ENFORCEMENT, DOESN'T TALK ABOUT DAMAGES UNDER A
8 TERMINATION THEORY.

9 NOW, I CONCEDE THERE ARE DIFFERENCES, OKAY, AND
10 PLAINTIFF MAY NOT HAVE THOUGHT OF THIS OR REALIZED IT, MAYBE NO
11 ONE ANALYZED IT. MAY BE IT'S NEVER BEEN LITIGATED, I DON'T
12 KNOW, BUT THE LAW IS WHAT THE LAW IS.

13 I'M NOT HERE MAKING SOME FLIMFLAM THEORY, I'M TALKING
14 ABOUT WHAT THE LEGISLATURE DECIDED. THEY DECIDED TO SEPARATE
15 THEM OUT, THEY DECIDED TO TREAT THEM DIFFERENTLY AND WORDS AND
16 INTEGRATED CONTRACT HAVE MEANING RIGHT HERE ON THIS PAPER, THEY
17 DON'T HAVE MEANING BASED ON 10,000 OTHER LEASES.

18 NOW, I'M NOT SAYING YOU'RE NOT ENTITLED TO DAMAGES,
19 SURE YOU ARE, SURE YOU'RE ENTITLED TO DAMAGES, THAT'S WHAT THE
20 LEASE SAYS.

21 I'M SAYING, WHAT IS THE MEANING OF THE ATTORNEYS' FEES
22 PROVISION IN LIGHT OF THE STATUTORY AUTHORITY THAT WE IN THIS
23 COURTROOM FOUGHT ABOUT? RJN 252

24 THE COURT: ARE YOU SAYING THAT THE STATUTORY
25 AUTHORITY AGGREGATES ANY PROVISION IN THE LEASE REGARDING

1 ATTORNEYS' FEES?

2 MR. LICHTERMAN: NO. I'M SAYING THE STATUTES PROVIDE
3 HOW YOU COLLECT DAMAGES AND WHAT NEEDS TO BE IN YOUR LEASE TO
4 COLLECT DAMAGES.

5 AND YOU GOT TO PICK HERE, IT'S 1951.2 OR 1951.4. ARE
6 YOU ENFORCING THIS CONTRACT WHICH HAS CONSEQUENCES FOR HOW YOU
7 COLLECT DAMAGES OR ARE YOU TERMINATING IT, WHICH HAS
8 CONSEQUENCES FOR HOW YOU COLLECT DAMAGES?

9 I THINK, THAT IS A MUCH TOO RESTRICTIVE VIEW OF
10 ENFORCING AS OPPOSED TO TERMINATING. THE REST OF THIS, JUST
11 LOOKING AT THIS, THE REST OF THE LANGUAGE IN THIS PARTICULAR
12 SECTION OF THE LEASE SAYS THE TERM PREVAILING PARTY SHALL
13 INCLUDE, WITHOUT LIMITATION, A PARTY OR BROKER WHO
14 SUBSTANTIALLY OBTAINS OR DEFEATS THE RELIEF SOUGHT AS THE CASE
15 MAY BE, WHETHER BY COMPROMISE, SETTLEMENT, JUDGEMENT OR THE
16 ABANDONMENT BY THE OTHER PARTY OR BROKER OF ITS CLAIM OR
17 DEFENSE.

18 AND BUT THE WHOLE NOTION THAT SOMEHOW YOU'RE NOT, WHEN
19 YOU'RE LOOKING IN 1951.2 YOU'RE NOT ENFORCING THE LEASE JUST
20 BECAUSE OF THE NICETY OF THE LANGUAGE THE LEASE TERMINATING,
21 WHEN THAT WHOLE SECTION TALKS ABOUT IF THERE IS A BREACH OF THE
22 LEASE THEN YOU ARE ATTEMPTING TO -- YOU ARE ATTEMPTING TO
23 ENFORCE OR DECLARE RIGHTS THEREUNDER AND YOUR ATTEMPTING TO
24 RECOVER UNDER THAT, YOU KNOW, UNDER THAT LEASE AS WELL AS THE
25 STATUTE.

RJN 253

1 I MEAN, THE STATUTE IS TALKING ABOUT WHEN THERE IS A
2 LEASE, BUT THIS IS WHAT MAY HAPPEN IF, IN FACT, IT'S BECAUSE OF
3 THE BREACH OF THE LEASE, A BREACH OF THE LEASE.

4 MR. LICHTERMAN: SURE.

5 THE COURT: THE LEASE TERMINATES.

6 MR. LICHTERMAN: I DON'T THINK WE CAN SEPARATE,
7 ISOLATE ONE ASPECT OF THE STATUTE. THERE ARE TWO ASPECTS OF
8 THE STATUTE AND VERY DIFFERENT METHODOLOGY FOR CALCULATING
9 DAMAGES UNDER EACH.

10 THE ONE SAYS YOU GOT TO WAIT FOR EACH SUBSEQUENT
11 BREACH AND THAT'S AN ENFORCEMENT. YOU'RE SAYING I'M HOLDING
12 YOU TO IT, IF YOU PAY YOU'RE NOT IN BREACH.

13 THE OTHER SAYS I'M NOT ENFORCING THIS LEASE, I'M
14 TERMINATING IT, I'M TERMINATING IT, I'M COLLECTING EVERYTHING
15 YOU WOULD HAVE OWED FOREVER. THAT'S A SUBSTANTIVE DIFFERENCE
16 IN THE STATUTE IN TWO SEPARATE PARTS AND I DON'T THINK WE CAN
17 CONFLICT THE TWO.

18 I THINK, THAT'S PROBLEMATIC. I THINK, THERE'S
19 ACTUALLY EVEN MORE FUNDAMENTAL PROBLEM.

20 IF YOU CHOOSE TO TERMINATE A LEASE, HOW ARE YOU STILL
21 ENTITLED TO ENFORCE THE ATTORNEYS' FEES PROVISION OF THAT
22 LEASE? RJN 254

23 BUT I WON'T EVEN GET TO THAT. I THINK, THE
24 LEGISLATURE MADE IT CLEAR, THERE ARE TWO SEPARATE WAYS OF
25 DEALING WITH THIS. AND WE STOOD UP HERE AND ARGUED VIGOROUSLY

1 THAT, WE SAID THE ENFORCEMENT PROVISION APPLIES.

2 THE COURT: COULD YOU, IN FACT, BRING AN ACTION
3 SEEKING DAMAGES ALA 1951.2 IF THERE WAS NO LEASE AT ALL?

4 MR. LICHTERMAN: I DON'T THINK THAT'S THE ISSUE.

5 THE COURT: ANSWER MY QUESTION.

6 MR. LICHTERMAN: SEEKING LEASE DAMAGES?

7 THE COURT: COULD YOU BRING AN ACTION FOR DAMAGES
8 USING METHOD UNDER 1951.2 WITHOUT THERE BEING A LEASE?

9 MR. LICHTERMAN: WITHOUT THERE BEING A LEASE?

10 THE COURT: IF THERE WERE NO LEASE AT ALL.

11 MR. LICHTERMAN: I THINK, YOU COULD NOT BRING AN
12 ACTION FOR DAMAGES UNDER ANY PROVISION OF 1951, WHETHER IT BE
13 .2 OR .4 WITHOUT A LEASE.

14 THE ISSUE IS, WHAT ARE YOU CLAIMING IS THE DAMAGE
15 YOU'RE ENTITLED TO?

16 IS IT ENFORCEMENT OR IS IT TERMINATION?

17 ONCE YOU PICK ONE OF THOSE YOU THEN CAN LOOK TO THE
18 CONTRACT AND SEE WHAT IT SAYS ABOUT ENFORCEMENT OR TERMINATION.

19 NOW, THIS ATTORNEYS' FEES PROVISION SAYS A LOT OF
20 THINGS, DOESN'T SAY TERMINATION. JUST COULDN'T SAY IT. WE
21 HAVE AN ARGUMENT HERE ABOUT ENFORCEMENT VERSUS TERMINATION.
22 THAT WASN'T AN ACCIDENT. **RJN 255**

23 THE COURT: THAT HAD DO WITH THE MEASURE OF DAMAGES.

24 MR. LICHTERMAN: HAD A LOT MORE TO DO WITH THAT. HAD
25 TO DO WITH WHAT THE CONTRACT SAYS ABOUT THE CONSEQUENCES THAT

1 FLOWED FROM A CHOICE A PLAINTIFF MAKES.

2 THE LEGAL CONSEQUENCES WHEN YOU READ JUST THIS
3 PROVISION ON ITS FACE, PLANE LANGUAGE AND YOU READ THE WAY THE
4 LEGISLATIVE DELIBERATELY DEvised A DAMAGES STATUTE. I DON'T
5 THINK YOU CAN IGNORE THAT.

6 I DON'T THINK YOU CAN SAY, WE'LL LOOK AT 1951.2 AND
7 NOT READ IT NARROWLY. IF WE DON'T READ IT NARROWLY WHY DO WE
8 HAVE 1951.4?

9 SHOULD WE PUT AN X THROUGH IT?

10 I DON'T THINK SO. I THINK, THE LEGISLATURE, I DON'T
11 EVEN HAVE TO THINK IT'S RIGHT THERE, THE LEGISLATURE MADE A
12 CONSCIOUS DECISION THAT THE TWO DIFFERENT THINGS A PLAINTIFF IN
13 A LEASE SITUATION CAN DO.

14 AND WE FORCED AN ELECTION ON PLAINTIFF. WE SAID, TELL
15 US WHICH ONE IT IS BECAUSE WE THINK IT'S THIS ONE. THEY SAID
16 NO WAY, NO WAY, IT'S NOT THAT ONE. AND NOW THEY WANT TO SAY,
17 WELL, BUT IT DOESN'T MATTER THAT WE MADE THAT CHOICE, THERE'S
18 NO LEGAL CONSEQUENCE TO THAT CHOICE.

19 THERE IS A LEGAL CONSEQUENCE, THERE'S A LEGAL
20 CONSEQUENCE FOR DAMAGE. THERE'S A LEGAL CONSEQUENCE FOR
21 CONTRACT INTERPRETATION. RJN 256

22 I DON'T THINK A DEFENDANT WHO HAD, YOU KNOW, DIDN'T
23 DRAFT THIS CONTRACT, HAD GIVEN TO HIM BY A BROKER REPRESENTING
24 PLAINTIFF, SHOULD BEAR THE PRICE OF PLAINTIFF'S ELECTION, AND
25 PARTICULARLY WHEN THE ISSUE WAS RAISED AND LITIGATED.

1 THE COURT: MR. BUNZEL, IS THERE ANYTHING YOU WANT TO
2 SAY ON THIS ONE?

3 MR. BUNZEL: THE ANSWER TO THE QUESTION YOU RAISED
4 WAS, NO, THE BREACH OF CONTRACT CLAIM FOR BREACH OF THE LEASE
5 COULD NOT HAVE BEEN BROUGHT IN THE ABSENCE OF A LEASE.

6 AND THIS WHOLE DISCUSSION IS ANSWERED AGAIN BY SECTION
7 13.2 (A) OF THE CONTRACT, WHICH INCORPORATES SECTION 1951.2 AND
8 SAYS, THAT AFTER TERMINATION THE PLAINTIFF CAN OBTAIN THESE
9 DAMAGES.

10 THERE'S NOTHING INCONSISTENT WITH TERMINATING THE
11 LEASE AND SEEKING TO ENFORCE THE DAMAGE PROVISIONS OF THE
12 LEASE. IT'S CONTEMPLATED BY THE LEASE AND IT'S HORNBOOK LAW
13 THAT A PLAINTIFF CAN TERMINATE THE LEASE AND SEEK DAMAGES FOR
14 BREACH OF LEASE.

15 MR. LICHTERMAN: I DON'T DISAGREE WITH THAT. I'M
16 SAYING THE LEGISLATURE HAS CALCULATED TWO DIFFERENT CHOICES FOR
17 DAMAGES, ONCE YOU MAKE ONE THERE'S A CONSEQUENCE TO THAT
18 CHOICE.

19 MR. BUNZEL: NOTHING IN THE SUIT ABOUT ATTORNEY'S
20 FEES. RJN 257

21 THE COURT: I DON'T KNOW HOW YOU EXPLAIN THEN
22 SUBPARAGRAPH C, THE LESSOR MAY RECOVER DAMAGES UNDER PARAGRAPH
23 3 OF THE SUBDIVISION OR OF SUBDIVISION A WHICH, OF COURSE, IS
24 NONE OF THE SECTIONS THAT WERE BEING USED FOR DAMAGES, IT --
25 ONLY IF THE LEASE PROVIDES -- I MEAN, REFERENCES BACK TO THE

1 LEASE CONSTANTLY.

2 MR. LICHTERMAN: BUT SO DOES 1951.4. THERE IS A CLEAR
3 DIFFERENCE BETWEEN THOSE STATUTES.

4 THE COURT: THERE MAYBE A DIFFERENCE, BUT I DON'T
5 THINK THE DIFFERENCE ESSENTIALLY VISCERATES AN ATTORNEY CLAUSE
6 PROVISION.

7 MR. LICHTERMAN: I'M NOT SAYING THAT, YOUR HONOR. I'M
8 SAYING, THE CONSEQUENCE OF ELECTING ONE REMEDY OVER ANOTHER --

9 THE COURT: I HEARD WHAT YOU SAID.

10 MR. LICHTERMAN: RIGHT. I DEFINITELY WANT TO MAKE IT
11 CLEAR, I'M NOT CLAIMING VISCERATES THE ATTORNEY FEES PROVISION.

12 THE COURT: YOUR THEORY IS IF IT MAKES THE ELECTION
13 THEN IT DOES, BUT I DON'T THINK THAT'S PERSUASIVE.

14 NOW, WITH RESPECT -- ON THE OTHER HAND, AS I
15 UNDERSTAND, PLAINTIFFS ARE TRYING TO GET SOME BENEFIT FROM THE
16 ASSIGNMENT AGREEMENT WITH RESPECT TO COST AND EXPENSE, RIGHT?

17 MR. BUNZEL: YES, YOUR HONOR.

18 THE COURT: BUT NEVER BECAME EFFECTIVE. SO IT'S
19 NONEXISTENT.

20 MR. BUNZEL: IT WAS LITIGATED, YOUR HONOR, AS TO ITS

21 --

22 THE COURT: IT WAS LITIGATED?

RJN 258

23 MR. BUNZEL: RIGHT.

24 THE COURT: BUT THE ASSIGNMENT NEVER BECAME EFFECTIVE.

25 MR. BUNZEL: YOUR HONOR, IT WAS A CONTRACT BETWEEN THE

1 PARTIES WHICH HAD RIGHTS AND OBLIGATIONS AND --

2 THE COURT: IT NEVER BECAME A QUOTE "CONTRACT".

3 MR. BUNZEL: NEVER BECAME EFFECTIVE PURSUANT TO THE
4 TERMS OF THE CONTRACT, BUT IT WAS EXECUTED BY THE PARTIES AND
5 THE PARTIES SUED TO INTERPRET THE ASSIGNMENT.

6 IT WAS THE CORNERSTONE OF THE AFFIRMATIVE DEFENSE OF
7 THE DEFENDANTS IN THE CASE AND IT WAS --

8 THE COURT: IT -- AND IT WAS AN AFFIRMATIVE DEFENSE.
9 WE GOT THIS ASSIGNMENT, ET CETERA, THEY LOST ON THAT.

10 BUT THEY DID NOT BRING AN ACTION ON THE ASSIGNMENT AND
11 IF THEY HAD BROUGHT AN ACTION ON THE ASSIGNMENT AND THEN YOU
12 RESPONDED TO THAT, YOU REBUTTED IT AND THEN YOU WON, THEN MAYBE
13 YOU HAVE SOME GROUNDS FOR SAYING WE'RE ENTITLED TO ATTORNEYS'
14 FEES.

15 BECAUSE THE ASSIGNMENT PROVIDES FOR ATTORNEYS' FEES
16 AND THEY BROUGHT AN ACTION ON IT, THEY LOST, YOU MIGHT BE ABLE
17 TO SAY YOUR ENTITLED TO ATTORNEYS' FEES. BUT THEY ASSERTED AS
18 AN AFFIRMATIVE DEFENSE AND I THINK THAT'S REALLY -- REALLY
19 FOLLOWS CALIFORNIA LAW.

20 MR. BUNZEL: PRIOR TO OR --

21 THE COURT: ISN'T THAT GIL MANSANO?

RJN 259

22 MR. LICHTERMAN: ABSOLUTELY.

23 MR. BUNZEL: IN THE GIL CASE THE PRIMARY CLAIM WHICH
24 LEAD TO THE DECISION THE ATTORNEYS FEES NOT BE AWARDED WAS A
25 TORT CLAIM, NOT A BREACH OF CONTRACT CLAIM. THIS WAS A

1 CONTRACT CASE AND --

2 THE COURT: BUT IT EXPLICITLY SAID THAT ASSERTING A
3 DEFENSE DOES NOT CONSTITUTE BRINGING OF AN ACTION.

4 MR. LICHTERMAN: ACTUALLY, YOUR HONOR, DEFENSE BASED
5 ON A CONTRACT, WHICH IS EXACTLY WHAT WE HAVE HERE, A DEFENSE OF
6 RELEASE BASED ON A CONTRACT WHICH IS ON ALL FOURS HERE. IT'S
7 WHAT AN OVATION IS.

8 MR. BUNZEL: TWO POINTS. FIRST, THE SECOND AMENDED
9 COMPLAINT AT PARAGRAPH 17 THROUGH 20 AND PARAGRAPH 22 OUR
10 PLEADING INITIATED LITIGATION OVER THE EFFECTIVENESS OF THE
11 ASSIGNMENT. SO THAT THE PLAINTIFF INTRODUCED THE LITIGATION OF
12 THE ASSIGNMENT.

13 IT'S PART OF OUR CASE EVEN THOUGH IT WAS THEIR
14 AFFIRMATIVE DEFENSE. WE INITIATED LITIGATION WITH RESPECT TO
15 THE EFFECTIVENESS OF THAT ASSIGNMENT. IT'S THEN SET FORTH AS
16 AN AFFIRMATIVE DEFENSE AND WAS LITIGATED.

17 THE COURT: WAS YOUR THEORY THE ASSIGNMENT WAS NOT IN
18 EFFECT, RIGHT?

19 MR. BUNZEL: CORRECT. WE HAD TO LITIGATE THAT AND IF
20 IT HAD BEEN EFFECTIVE, THEN ACCORDING TO CALIFORNIA LAW UNDER
21 THAT PROVISION FOR ATTORNEYS' FEES THE DEFENSE WOULD HAVE
22 RECEIVED ATTORNEYS' FEES FOR DEFEATING OUR CONTRACT AND COULD
23 RELY UPON THE ASSIGNMENT. RJN 260

24 AND CALIFORNIA LAW AS WE BRIEFED IT THE SHU CASE,
25 S-H-U, AT 9 CAL 4TH PAGE 873 THROUGH 871, MAKES THAT RIGHT TO

1 ATTORNEYS' FEES UNILATERAL.

2 IT'S ONLY FAIR IF THEY'RE GOING TO BRING IN A CONTRACT
3 IN THE CASE IN DEFENSE OF OUR CONTRACT CASE, WE'RE ENTITLED TO
4 IF WE PREVAIL UNDER THAT CONTRACT OF OBTAINING ATTORNEYS' FEES
5 THEY OTHERWISE WOULD GET IF THEY HAD PREVAILED, OTHERWISE IT
6 WOULD BE A ONE-DAY ATTORNEY FEES PROVISION IN VIOLATION OF
7 1717.

8 THE COURT: YOU DON'T THINK IT MAKES ANY DIFFERENCE
9 AFFIRMATIVE DEFENSE THEY'RE NOT SUING ON?

10 MR. BUNZEL: I THINK, IF YOU LOOK AT THE LANGUAGE OF
11 THE CONTRACT, THAT IS THE ASSIGNMENT ITSELF, IT PROVIDES THAT
12 IF ANY PARTY SUES TO INTERPRET THE ASSIGNMENT, DOESN'T SAY TO
13 ENFORCE, OR ENFORCE, INTERPRET OR ENFORCE THE ASSIGNMENT, THAT
14 ATTORNEYS' FEES ARE AWARDBLE TO THE PREVAILING PARTY.

15 THIS CASE INTERPRETED THAT ASSIGNMENT. THAT
16 ASSIGNMENT WAS EXECUTED BY BOTH PARTIES. IT DID NOT BECOME
17 EFFECTIVE BECAUSE THE CONDITIONS SUBSEQUENT OR PRECEDENT TO ITS
18 EFFECTIVENESS DID NOT MATURE.

19 BUT IT CLEARLY PROVIDED FOR ATTORNEYS' FEES FOR ITS
20 INTERPRETATION AND WE HAD TO GET OUT OF THE EFFECTIVENESS OF
21 THAT ASSIGNMENT PROTRACTED LITIGATION AND ENTITLED TO THE COST
22 PROVISIONS THEREUNDER. RJN 261

23 MR. LICHTERMAN: I WOULD INVITE THE COURT TO LOOK AT
24 THE SECOND AMENDED COMPLAINT. THERE IS ONE CAUSE OF ACTION ON
25 ONE CONTRACT, CLAIMING BREACH OF ONE CONTRACT DEALING WITH THE

1 TERMS OF ONE CONTRACT, THERE'S NOT EVEN A MENTION OF TERMS OF
2 THE OTHER CONTRACT EXCEPT TO SAY THAT IT NEVER BECAME
3 EFFECTIVE. THAT'S IT.

4 MR. BUNZEL: AGAIN, THAT'S NOT TRUE.

5 MR. LICHTERMAN: NO ATTEMPT TO ENFORCE THAT
6 ASSIGNMENT, CERTAINLY NO ATTEMPT TO INTERPRET. THEY DIDN'T SAY
7 WE DISAGREE WITH WHAT THIS MEANS, THEY JUST SAID IT NEVER
8 BECAME EFFECTIVE.

9 MORE THAN THAT, FORGET WHAT THE COMPLAINT SAID, YOU
10 WERE HERE WHEN THE WITNESSES SAT UP THERE AND SAID, NO, NO, NO,
11 WE DON'T DISAGREE WITH THIS, WE DON'T THINK IT'S WRONG,
12 MISUNDERSTAND ITS MEANING, WHAT WE'RE SAYING IS THEY NEVER
13 SIGNED AMENDMENT NUMBER TWO, THAT'S WHAT THEY'RE SAYING.

14 NOW, GIL VERSUS MANSANO ADDRESSED THIS CASE ALMOST ON
15 ALL FOURS. THE ONLY DIFFERENCE IS THAT THE INITIATING ACTION
16 WAS TAUGHT AND THE INITIATING ACTION BEING TAUGHT MEANS NOTHING
17 EXCEPT THAT THE INITIATING PLAINTIFF HAD THEY PREVAILED WOULD
18 NOT BE ENTITLED TO UNILATERAL ATTORNEYS' FEES. OKAY.

19 THERE THE ISSUE WAS WHEN YOU ASSERT AN AFFIRMATIVE
20 DEFENSE RATHER THAN INITIATE AN ACTION, THEN YOU ARE NOT
21 ENTITLED UNDER NARROW INITIATING ACTION LANGUAGE TO CLAIM THAT
22 YOU INITIATED THE ACTION. OKAY. RJN 262

23 NOW, I DON'T KNOW WHAT MR. BUNZEL IS CLAIMING NOW WAS
24 INITIATED WITH RESPECT TO THE ASSIGNMENT, BUT THERE'S ONLY ONE
25 CAUSE OF ACTION IN THAT SECOND AMENDED COMPLAINT AND THERE'S

1 ONLY ONE CONTRACT EVER INITIATED ANY LAWSUIT ON.

2 MAYBE THAT IMPLICATED ANOTHER CONTRACT, AND YOU WILL
3 RECALL THAT THE SECOND AMENDED COMPLAINT CAME ABOUT TO DEAL
4 WITH THE SUCCESS THAT OPSYS LITIGATED IN DEFENDING PRIOR
5 COMPLAINT ON THE BASIS OF ITS AFFIRMATIVE DEFENSES.

6 AND WHAT HAPPENED THEN, AND WE MADE STRONG OBJECTIONS
7 TO THIS AT THE TIME, WAS WE SAID THE PLAINTIFF SHOULD NOT BE
8 ALLOWED TO AMEND TO PLED FACTS AROUND AN AFFIRMATIVE DEFENSE.

9 PLAINTIFF AT THAT TIME DIDN'T SAY, NO, NO, WE'RE
10 INITIATING AN ACTION ON THAT, THEY SAID, YES, WE SHOULD, WE'RE
11 JUST BRINGING CLARITY TO WHY WE PREVAIL ON OUR CONTRACT CLAIM.

12 THAT'S WHAT THIS IS ABOUT, CLARITY, THERE'S NO
13 INITIATION OF AN ACTION THERE. WHEN AN ACTION IS INITIATED THE
14 MERE FACT IT IMPLICATES OTHER CONTRACT, IT'S DOESN'T MEAN YOU
15 INITIATED AN ACTION ON THOSE OTHER CONTRACTS.

16 THE COURT: OKAY.

17 MR. BUNZEL: THAT MONOLOGUE STARTED WITH A STATEMENT,
18 THE SECOND AMENDED COMPLAINT WHICH I DRAFTED WHICH DID NOT
19 ADDRESS THE ASSIGNMENT OTHER THAN PASSING. PARAGRAPH 17 TO 22
20 DEAL WITH THE ASSIGNMENT. THEY DEAL WITH THE TERMS OF THE
21 ASSIGNMENT, WHY IT WAS NOT EFFECTIVE AND WHY AT TRIAL WAS
22 NECESSARY FOR BREACH OF CONTRACT. RJN 263

23 PARAGRAPH 22 OF THE SECOND AMENDED COMPLAINT
24 DESCRIBING THE BREACH OF CONTRACT ALLEGATIONS EXPRESSLY STATES
25 THAT THE ASSIGNMENT WAS NOT EFFECTIVE FOR THE REASONS SET FORTH

1 IN PARAGRAPH 17 THROUGH 22.

2 IT WAS CLEARLY THE PRIMARY ISSUE THAT WAS LITIGATED IN
3 THIS CASE, WAS INITIATED, THAT'S THE LANGUAGE OF THE ASSIGNMENT
4 DOCUMENT, TO CONSTRUE OR INTERPRET THE ASSIGNMENT, EITHER BY
5 THE PLAINTIFF, OR THE DEFENDANT, OR BOTH.

6 AND IT WOULD, I THINK, IT WOULD BREAK THE RULE OF
7 MUTUALITY OF ATTORNEYS' FEES HAVING -- PREVAILING UNDER THAT
8 CONTRACT NOT TO OBTAIN THE ATTORNEYS' FEES THAT THE DEFENSE
9 WOULD HAVE OBTAINED. FAIRLY SIMPLE.

10 MR. LICHTERMAN: GO AHEAD. I THINK THE RULE --

11 THE COURT: MIGHT HAVE BEEN ENTITLED THE ATTORNEYS'
12 FEES HAD THEY PREVAILED ON, YOU KNOW, AS AGAINST YOU WITH
13 RESPECT TO THE CONTRACT CLAIM.

14 MR. LICHTERMAN: THE RULE --

15 THE COURT: THAT WAS AN AFFIRMATIVE DEFENSE THAT WOULD
16 HAVE EATEN INTO AND, PERHAPS, ULTIMATELY DEFEATED THE CONTRACT
17 CLAIM.

18 MR. LICHTERMAN: NO, YOUR HONOR.

19 THE COURT: THEY COULD HAVE POSSIBLY -- THEN POSSIBLY
20 COULD HAVE PREVAILED, BUT IT WOULD HAVE BEEN BY VIRTUE OF
21 DEFEATING YOUR CONTRACT CLAIM, NOT BY VIRTUE OF AN AFFIRMATIVE
22 DEFENSE ON THE ASSIGNMENT. RJN 264

23 MR. BURNS: CORRECT. THE RULE OF MUTUALITY DOES NOT
24 AGGREGATE THE CONTRACT LANGUAGE. JUST SAYS IF ONE PARTY
25 ENTITLED UNDER THE CONTRACT SO IS THE OTHER. UNDER THIS

1 LANGUAGE INITIATED -- THIS IS GIL V. MANSANO WE DIDN'T INITIATE
2 WE'RE NOT ENTITLED,, THERE'S NO MUTUALITY ISSUE.

3 THE COURT: THINK THAT'S ENOUGH.

4 MR. BUNZEL: THIS RELATES TO THE COST ISSUE --

5 THE COURT: I KNOW.

6 MR. BUNZEL: -- PLEADING.

7 THE COURT: MUCH ADO ABOUT COST?

8 YOU'RE READING THE ATTORNEYS' FEES PROVISION IN THE
9 LEASE AS NOT COVERING COSTS; IS THAT CORRECT?

10 THE COURT: THAT'S CORRECT. THAT SAYS ATTORNEYS' FEES
11 ONLY IN THAT LATTER PART. IT WHERE IT SAYS IN ADDITION LESSOR
12 SHALL BE ENTITLED TO ATTORNEY FEES, THAT'S VERY EXPLICIT WHAT
13 THAT INVOLVES --

14 MR. LICHTERMAN: I THINK, IT GOES BEYOND COST, IT GOES
15 TO ENFORCEMENT. THAT'S RIGHT OUT OF PLAINTIFF'S OWN PLEADINGS.
16 THEY ADMIT THE ASSIGNMENT IF THAT PROVISION APPLIED AND IT
17 DOESN'T -- WOULD ALLOW COSTS TO ENFORCE A JUDGMENT.

18 THE COURT: I'M NOT SURE HOW YOU CAN ENFORCE AN
19 AGREEMENT. ESSENTIALLY WAS WHAT THE ASSIGNMENT WAS SUPPOSE TO
20 BE WAS AN AGREEMENT THAT NEVER WENT INTO EFFECT ALSO. I THINK,
21 THAT'S A STRETCH.

22 MR. BUNZEL: YOU CAN HAVE TO DECLARATORY RELIEF OR
23 RELATED LITIGATION. HERE WE LITIGATED WHETHER THE ASSIGNMENT
24 WAS EFFECTIVE.

RJN 265

25 FOR A LONG TIME IT WAS INTEGRAL PART OF THE CONTRACT

1 CLAIM AND PARTIES CAN LITIGATE THAT WITH AN ATTORNEY'S FEES
2 CLAUSE AND BE LIABLE FOR ATTORNEYS' FEES, EVEN THOUGH THE
3 CONCLUSION OF THE TRIER OF FACT IS THAT THE CONTRACT WAS NOT
4 EFFECTIVE.

5 IF THAT'S WHERE THE COURT IS RESTING ITS THINKING, I
6 DON'T BELIEVE THAT'S AN ACCURATE READING OF CALIFORNIA LAW.
7 FOR THE REASONS THIS RELATED CASE SAY --

8 THE COURT: THAT'S ALL STUFF WE CAN TAKE UP.

9 MR. LICHTERMAN: THAT'S KIND OF MY POINT, THERE IS NO
10 DECK RELIEF CLAIM, THERE NEVER WAS. AT THE RISK OF HUMORING
11 THE COURT AND MR. BURNS, THAT'S AN EQUITABLE CLAIM AND WOULD
12 HAVE RESTORED OUR EQUITABLE DEFENSES.

13 THE COURT: YOU KEEP TRYING. LET'S TALK
14 APPORTIONMENT.

15 MR. LICHTERMAN: IF AT FIRST YOU DON'T SUCCEED.

16 THE COURT: LET'S TALK APPORTIONMENT.

17 FIRST OF ALL, LET ME GET RIGHT OFF THE TOP, NOT SPEND
18 A LOT OF TIME ON THIS.

19 YOU KNOW, I FEEL SORRY FOR MR. CHIU IN THAT HE HAD AN
20 ATTORNEY WHO DRAFTED A SHODDY COMPLAIN AND TOOK AWHILE TO GET
21 THROUGH THE VARIOUS AND SUNDRY MOTIONS, BUT NONETHELESS
22 DEFENDANTS EVEN THOUGH THEY DO NOT PREVAIL AND MR. CHIU DID OR
23 PLAINTIFF PREVAILED SHOULD NOT HAVE TO PAY FOR THE FIRST
24 ATTORNEY AND HIS SLOPPY WORK. RJN 266

25 SO THEN MY QUESTION WAS WITH REGARD TO WHAT WAS IT?

1 BUT CERTAINLY WITH NEW COUNSEL COMING IN HAVING TO DRAFT AN
2 AMENDED COMPLAINT AND I WOULD TREAT THAT AS IF THERE WAS NO
3 PRIOR COMPLAINT.

4 ESSENTIALLY DRAFTED UP A NEW COMPLAINT, WHATEVER
5 EXPENSES OR RATHER ATTORNEYS' FEES WERE ENCOUNTERED IN DOING
6 THAT OR INCURRED IN DOING THAT YOU'RE ENTITLED TO, AND THE
7 QUESTION IS HOW MUCH CAN YOU PARSE OUT OF THIS?

8 I GUESS, APPROXIMATELY \$71,000.

9 HOW MUCH OF THAT WOULD BE ATTRIBUTED TO CLEANING UP
10 THE WORK THAT HAD BEEN DONE BEFORE AS OPPOSED TO DELVING INTO
11 THE CASE?

12 IT'S A NEW CASE AND LEARNING WHAT YOU HAD TO LEARN
13 ABOUT IT AS YOU WOULD DO IN ANY CASE AND THEN DRAFTED THE --
14 DRAFTING THE AMENDED COMPLAINT, CAN YOU DO THAT?

15 **MR. BUNZEL:** YES. I CAN ANSWER THAT EASILY. THE WORK
16 OF PRIOR COUNSEL SERVED NO PURPOSE, BENEFIT OR TOUCHSTONE IN
17 OUR HOUSE SINCE WE STARTED OVER AGAIN.

18 **THE COURT:** DID ANY OF THAT, IS ANY OF THAT \$71,000,
19 DOES ANY OF THAT \$171,000 REPRESENT UNDO THAT WHICH HAD BEEN
20 DONE?

21 **MR. BUNZEL:** NO, IT WAS WRITING A SECOND AMENDED
22 COMPLAINT FOR BREACH OF CONTRACT AND NOT PURSUING A FRAUD
23 CLAIM. **RJN 267**

24 **THE COURT:** DO YOU HAVE ANY REASON TO QUESTION THAT?

25 **MR. LICHTERMAN:** WELL, YES, YOUR HONOR, PROBABLY NOT

1 TO A LARGE EXTENT. THE ONLY ISSUE IS -- AND THIS IS MY
2 RECOLLECTION, I'M SORRY, THIS WAS NOT PUT IN THE RECORD BEFORE
3 YOU WHEN PLAINTIFF'S COUNSEL REQUESTED LEAVE TO FILE THE SECOND
4 AMENDED COMPLAINT, THERE WERE REFERENCES MADE TO TRYING TO BE
5 CONSISTENT WITH THE COURT'S PRIOR 12(B) ORDERS AND EFFORTS TO
6 BRING A COVENANT OF GOOD FAITH AND FAIR DEALING CLAIM THAT
7 SOUNDED VERY STRONGLY IN FRAUD.

8 I'M NOT SURE, I HAVE NO INSIGHT INTO HOW THAT WORKED
9 ON THE PLAINTIFF'S SIDE, I JUST RAISE IT FOR SOMETHING FOR THE
10 COURT TO CONSIDER.

11 **THE COURT:** WASN'T THERE BREACH OF COVENANT AND GOOD
12 FAITH AND FAIR DEALING CLAIM OR PURPORTED ONE ANYWAY,
13 ESSENTIALLY RIDING ALONG WITH THIS?

14 I THINK, AT SOME POINT EITHER BEFORE OR AT TRIAL I
15 SUGGESTED DUMPING THIS SINCE YOUR DAMAGE MEASURE WASN'T GOING
16 TO BE ANY DIFFERENT.

17 **MR. BUNZEL:** WE ALLEGED IN THE FIRST CAUSE OF ACTION
18 IN THE SECOND AMENDED COMPLAINT THAT ONE FORM OF BREACH OF
19 CONTRACT HERE WAS BREACH OF THE COVENANT OF GOOD FAITH AND FAIR
20 DEALING, NOT CREATING A SEPARATE CAUSE OF ACTION, BUT ALLEGING
21 THAT WAS AN ADDITIONAL TYPE OF BREACH OF THE SAME CONTRACT, AND
22 YOUR HONOR RULED BEFORE INSTRUCTING THE JURY THAT THE JURY
23 WOULD NOT BE INSTRUCTED ON BREACH OF COVENANT OF GOOD FAITH AND
24 FAIR DEALING. **RJN 268**

25 **THE COURT:** I WOULD THINK THAT, UNLESS YOU CAN

1 DEMONSTRATE OTHERWISE, I CONCLUDE THAT THAT KIND OF A CLAIM IS
2 PRETTY MUCH BOUND UP IN A CONTRACT CLAIM.

3 THE KIND OF WORK YOU WOULD PUT INTO NOT GOING TO BE
4 MUCH DIFFERENT FROM NOR IS IT GOING TO ADD TO THE WORK JUST
5 BRINGING REGULAR BREACH OF CONTRACT CLAIM.

6 MR. LICHTERMAN: ORDINARILY I MIGHT AGREE WITH YOU.
7 IN THIS CASE, I THINK, THERE ARE SOME INTERESTING FACTS THAT
8 FORM THIS DECISION. THE HISTORY HERE WE HAD THESE FRAUD CLAIMS
9 DISMISSED WITH PREJUDICE AND --

10 THE COURT: THAT WAS BEFORE.

11 MR. LICHTERMAN: CORRECT.

12 THE COURT: THEY COME INTO THE CASE.

13 MR. LICHTERMAN: THAT WAS BEFORE THE BARTKO FIRM CAME
14 INTO THE CASE, WHEN NEW COUNSEL CAME IN THEY PUT IN ONE OF
15 THEIR PLEADINGS, I CAN'T RECALL WHICH ONE, THEY WANT TO AMEND
16 THEIR COMPLAINT BUT CONSISTENTLY WITH THE 12(B)(6) ORDER BY THE
17 COURT.

18 IT'S PRETTY CLEAR, IN FACT, I THINK IT LEAPS OFF THE
19 PAGE WHAT THEY WERE REALLY TRYING TO DO WAS GET BACK AT A FRAUD
20 THEORY, GET DISCOVERY ON IT. IN FACT, THEY FLAT OUT SAID IT IN
21 THE SECOND AMENDED COMPLAINT THEY WANTED SOME DISCOVERY ON IT,
22 DO SOME WORK ON THAT ISSUE. RJN 269

23 YOU'RE TRYING TO AVOID THE CONTRACT, IT WAS YOU DID
24 THESE SHADY THINGS TO DEFRAUD THE LANDLORD, TO PREVENT HIM FROM
25 GETTING, YOU KNOW, TO -- MR. BUNZEL MADE A VERY IMPASSIONED

1 CLOSING ARGUMENT ON THIS, ABOUT HIGHLY MOTIVATED BUSINESSMEN
2 WHO WERE TRYING TO DUP THE LANDLORD OUT OF SOME MONIES OWED
3 HIM.

4 I THINK, WHAT WAS REALLY GOING ON HERE, I THINK
5 EVERYBODY KNEW IT, THIS WAS AN ATTEMPT TO BACKDOOR FRAUD INTO
6 THE CASE.

7 THE COURT: WELL, YOU DO -- YOU THINK -- IS THERE
8 EVIDENCE THEY ACTUALLY SPENT TIME ON THAT AS TO WORKING UP HIS
9 PASSION DURING CLOSING ARGUMENT?

10 MR. LICHTERMAN: THAT'S EXACTLY MY ISSUE. A LOT OF
11 EVIDENCE THAT, THERE'S A TON OF IT, NONE OF IT IS BEING
12 PRESENTED TO THE COURT.

13 WHAT HAPPENED IS THE VERY FIRST THING FILED BY BARTKO
14 SAID WE'VE BEEN ANALYZING WHAT YOUR HONOR DID AND WE KNOW WHAT
15 YOU DID WITH THE FRAUD.

16 SO I KNOW THAT WE'RE THINKING ABOUT IT AND THEY COME
17 UP WITH A VERY CLEVER WAY TO TRY TO GET AROUND IT. WE
18 LITIGATED THAT THROUGH THE COURSE OF DISCOVERY. IN FACT, IN
19 MOST OF PLAINTIFF'S DISCOVERY WAS DIRECTED TO CDT AND THIS
20 WHOLE WILD FRAUD THEORY. **RJN 270**

21 THE LEASE ITSELF WAS PRETTY SIMPLE CASE BY PLAINTIFF'S
22 OWN ADMISSION, AT LEAST, FOUR CONDITIONS MET, DID YOU PAY THE
23 RENT, THAT WAS IT, THAT WAS MS. HUBER'S OPENING ARGUMENT, SHE
24 STOOD UP THERE AND SAID THAT'S ALL HAVE YOU TO DECIDE.

25 THE COURT SAID THERE'S A LEASE HERE, NO DISPUTE

1 THERE'S A LEASE HERE. WE HAVE MOTIONS IN LIMINE ON IT. RIGHT
2 UP UNTIL THE EVE OF TRIAL WE HAD EXPECTED CDT WITNESSES TO
3 HAVE TO COME INTO COURT AND EXPLAIN THIS TRANSACTION.

4 WE HAVE TWO DAYS OF MOTIONS IN LIMINE ON THAT AND, I
5 THINK, THAT WAS ALL CLEARLY DIRECTED AT FRAUD. AND PLAINTIFF'S
6 IN MOTIONS IN LIMINE SAID, WELL, WE CAN KIND OF FIT IT IN UNDER
7 THIS 12.1(A) THEORY.

8 AND THE COURT SAID, WELL, WAIT A MINUTE, THAT SAYS YOU
9 GOT TO HAVE 25 PERCENT STOCK TRANSFERRED, WE KNOW HE HAD OR
10 ONLY 16 PERCENT, AND EVENTUALLY, LITERALLY THE NIGHT BEFORE
11 TRIAL PLAINTIFF ABANDONED THIS WHOLE CDT THEORY CLINGING STILL
12 ONTO ITS COVENANT OF GOOD FAITH ARGUMENT, WHICH HAD BEEN MADE
13 EVEN AFTER THE COURT'S RULING.

14 SO, I THINK, WE ALL KNOW WHAT WAS REALLY GOING ON
15 THERE AND, I THINK, THIS CUTS TO THE HEART OF THE APPORTIONMENT
16 BECAUSE MOST OF THAT DISCOVERY WAS NOT DIRECT TO THE LEASE, WAS
17 NOT DIRECTED AT -- OPSYS LITIGATED IT, WHAT DIRECTED FINDING
18 OUT ABOUT CDT AND WE SEE THAT IN THE RULE 25 MOTION.

19 WE SEE THAT IN THE EXPERT WITNESS WHO WAS HIRED TO
20 DEAL WITH CDT, EVEN THOUGH CDT WASN'T A PARTY. TRANSACTIONS
21 ABOUT FRAUD AND THE EXPERT WITNESS AND HOW IT SAYS IN A
22 DECLARATION IT'S A FRAUD. **RJN 271**

23 SO WE KNOW WHAT WAS GOING ON. I DON'T THINK WE SHOULD
24 OVERLOOK THAT. THAT'S THE REASON COSTS WERE SO HIGH IN THIS
25 CASE.

1 MR. BUNZEL: YOUR HONOR, THIS IS EXPLAINED IN
2 MR. AINSLIE'S DECLARATION, AND THE COURT MIGHT RECALL THAT WE
3 DID SPEND TIME IN DISCOVERY IN THIS CASE AND PRETRIAL WITH
4 RESPECT TO WHETHER THE PLAINTIFF WOULD SEEK AN ADDITIONAL 10
5 PERCENT UNDER THE CONTRACT FOR UNCONSENTED ASSIGNMENT, THAT IS
6 THE TRANSFER OF CONTROL OF OPSYS LIMITED TO CDT.

7 IT'S A COMPLICATED QUESTION, THE CONTRACT DOES NOT
8 LIMIT THE CIRCUMSTANCES WHICH THAT COULD OCCUR TO 25 PERCENT.
9 WE HAD A CONTRACT, THAT TRANSACTION AGREEMENT FOR WHICH WE'LL
10 TALK ABOUT WITH MR. ERICSON IN A LITTLE BIT, IN WHICH ALL
11 CONTROL WAS CEDED TO CDT.

12 I MADE A DECISION AS A TRIAL LAWYER LISTENING TO YOUR
13 HONOR'S REACTION TO THE COMPLEXITY OF THIS CLAIM, THAT IT WAS
14 NOT IN A SINGLE CAUSE OF ACTION, BREACH OF CONTRACT CASE
15 NECESSARY FOR THE PLAINTIFF TO PURSUE THE CDT CONTRACT BREACH
16 ISSUE 12.1 OF THE LEASE TO THE JURY.

17 BUT THE LAW IS THAT WE'RE ENTITLED TO PARE THAT DOWN.
18 THERE'S NO AUTHORITY THAT'S BEEN CITED BY THE DEFENDANT THAT IN
19 A SINGLE CAUSE OF ACTION BREACH OF CONTRACT CLAIM, THAT IF AN
20 ELEMENT ONE TYPE OF BREACH IS NOT PURSUED TO THE JURY THAT
21 SOMEHOW THAT SHOULD BE APPORTIONED OUT.

22 THAT WOULD PENALIZE THE PLAINTIFF AND, INDEED, CAUSE
23 ALL PLAINTIFFS TO GIVE EVERYTHING TO THE JURY, OTHERWISE THEY
24 MIGHT LOSE THEIR ATTORNEYS' FEES. RJN 272

25 WE MADE A DECISION WITHIN A SINGLE CAUSE OF ACTION

1 COMPLAINT TO PARE OUT 10 PERCENT OF THE POTENTIAL DAMAGES FOR
2 EFFICIENCY REASONS, AS I THINK A LOT OF TRIAL LAWYERS WOULD DO
3 AND THAT'S WHY WE DID IT.

4 THERE'S ABSOLUTELY NO AUTHORITY THAT WOULD ALLOW THE
5 COURT TO APPORTION ATTORNEYS' FEES AND SAY, YOU KNOW, YOU
6 RECOVER DAMAGE UNDER SECTION 13.2 BUT NOT UNDER 12.1 AND,
7 THEREFORE, YOU ARE SINGLE CAUSE OF ACTION.

8 BREACH OF CONTRACT CLAIM NEEDS TO BE APPORTIONED, I
9 THINK, THE LAW IS VERY MUCH TO THE CONTRARY. WE HAVE IN THE
10 MATERIALS THAT WE PRESENTED TO YOU APPORTIONED OUT ALL OF THE
11 TIMES SPENT, AND I DID THIS MYSELF PERSONALLY GOING THROUGH OUR
12 TIME RECORDS, SOME EFFORT, ALL OF THE TIME SPENT WITH RESPECT
13 TO WHETHER CDT WOULD BE ADDED AS A PARTY TO THE CASE UNDER
14 SUCCESSOR OR UNDER THEORY.

15 THAT WAS SEPARATED OUT, THAT WAS APPROXIMATELY \$20,000
16 AT THE TIME WE FILED OUR MOTION, AND IT'S OBVIOUSLY MORE THAN
17 THAT SINCE WE'RE ADDRESSING THEIR BRIEFS NOW, BUT THAT HAS BEEN
18 SEGREGATED OUT.

19 IT'S NOT POSSIBLE TO SEGREGATE OUT NOR IS IT NECESSARY
20 WHAT MR. BURNS WOULD LIKE US TO DO, NO CASE LAW SUGGEST --

21 **MR. LICHTERMAN:** I THINK, IT SHOULD BE CLEAR WHAT IT
22 IS THAT I'M SAYING, WHICH IS BLACK LETTER CALIFORNIA LAW. YOU
23 DO NOT GET FEES FOR CLAIMS THAT ARE NOT CONTRACT CLAIMS.

24 IF YOU WANT TO PUT ASIDE, LOOK AT THE SECOND AMENDED
25 COMPLAINT, IT CLEARLY SAYS IN ONE OF THE LATTER PARAGRAPHS, I

1 THINK, IT'S 22, THAT THEY ARE ADDING ALLEGATIONS TO PURSUE
2 DISCOVERY ABOUT SUCCESSOR LIABILITY, THAT'S NOT TODAY, RIGHT AT
3 THE BEGINNING.

4 SO FORGET WHAT'S THE SELF-INTEREST ARGUMENT OF BOTH
5 SIDES TODAY, LOOK AT PLAINTIFFS OWN PLEADINGS AND THAT'S WHAT
6 THEY DID. THEY SPEND A LOT OF TIME --

7 THE COURT: IF I DETERMINE THAT NEEDS TO BE SOME
8 APPORTIONING I'M GOING TO COME BACK TO YOU AND ASK YOU EACH
9 GIVE ME YOUR FIGURES THEN. OKAY.

10 AND, I THINK, LET'S THEN MOVE ONTO WHAT REQUIRES
11 PHOTOGRAPHS AND CHARTS, I THINK, TO EXPLAIN. WHO'S GOING TO BE
12 HEARD ON THIS?

13 MR. ERICSON.

14 MR. ERICSON: I AM.

15 MR. BUNZEL: I'M STILL HERE. I'M BATTING IN ALL
16 THINGS TODAY.

17 THE COURT: LET ME ASK YOU THIS, MR. ERICSON. WHAT,
18 AFTER THIS 2002 TRANSACTION, WHAT WAS LEFT OF OPSYS LIMITED?

19 WHAT WAS IT DOING?

20 WHAT ASSETS DID IT HAVE?

21 OBVIOUSLY, GOT SOME MONEY FROM CDT, RIGHT?

22 MR. ERICSON: YES.

RJN 274

23 THE COURT: BUT WHAT WAS THERE, TRANSFERRED, WHATEVER
24 IT HAD IN THE U.S., I GUESS, ASSETS AND LIABILITIES IN THE U.S.
25 TO OPSYS U.S.

1 MR. ERICSON: YES.

2 THE COURT: WHATEVER IT HAD IN THE UK, DID IT TRANSFER
3 LIABILITIES AS WELL AS ASSETS IN THE UK TO OPSYS UK?

4 MR. ERICSON: YES, I BELIEVE SO, YOUR HONOR. I
5 BELIEVE THAT'S RIGHT. IT HAD VERY LITTLE LEFT IN OPSYS ITSELF,
6 THAT WAS ESSENTIALLY A HOLDING COMPANY WITH RESPECT TO OPSYS
7 UK. IT HAD NO OPERATIONS AS SUCH AFTER '02.

8 THE COURT: IT HAD --

9 MR. ERICSON: I WOULD SAY, I'M VERY SORRY I DID NOT
10 BRING ANY PHOTOGRAPHS AND CHARTS. IF I HAD ONLY KNOWN I WOULD
11 HAVE DRAWN THEM MYSELF.

12 THE COURT: I GAVE UP, I DREW A COUPLE THEN I HAD TO
13 TOSS THEM BECAUSE THE LINES WERE GETTING CONFUSING AND I DIDN'T
14 UNDERSTAND MY OWN GRAPH.

15 AT SOME POINT 2 MILLION, AM I CORRECT, 2 MILLION WENT
16 FROM CDT LIMITED TO OPSYS LIMITED FOR LICENSING OF TECHNOLOGY;
17 IS THAT CORRECT?

18 MR. ERICSON: THERE WAS 2 MILLION AND I, FRANKLY,
19 FORGET WHICH ENTITY CAME FROM. THERE WAS 2 MILLION FOR A
20 LICENSE AGREEMENT, IT WAS SORT OF A BACKSTOP LICENSE.

21 THERE WERE CERTAIN THIRD-PARTY CONSENTS THAT WERE
22 NEEDED TO BE ABLE TO USE THE IP AND THIS CASE THEY COULDN'T GET
23 THOSE THIRD-PARTY CONSENTS. THEN THIS LICENSE OR SUBLICENSE AS
24 YOU RECALL WOULD HAVE STEPPED IN. RJN 275

25 AS IT TURN OUT THE CONSENTS WERE OBTAINED, SO THE

1 LICENSE WAS LATER WRITTEN OFF AND ACTUALLY TURNED OUT TO BE OF
2 NO VALUE. YOUR RIGHT, 2 MILLION WAS PAID FOR THAT LICENSE
3 PURELY AS A BACKSTOP.

4 THE COURT: THAT 2 MILLION WENT TO OPSYS LIMITED; IS
5 THAT CORRECT?

6 MR. ERICSON: I BELIEVE IT WAS PAID TO OPSYS, ASH YOU
7 MAY CORRECT ME IF I'M WRONG.

8 MS. HAYASHI: IT DID GO TO OPSYS LIMITED.

9 THE COURT: OPSYS LIMITED FOR LICENSING OF THEIR
10 TECHNOLOGY, AND THE LICENSING RIGHTS WENT THEN TO CDT LIMITED;
11 IS THAT CORRECT?

12 MR. ERICSON: IT WAS CDT LIMITED. IT IS IMPORTANT TO
13 KEEP THE LIMITEDS AND THE INC. SEPARATE, THEY ARE VERY SEPARATE
14 ENTITIES.

15 THE CDT LIMITED WHICH, AGAIN, MANAGEMENT CONTROL OVER
16 OPSYS UK IN '02 AND CDT, INC. OWNED ALL, ALL IT OWNED WAS
17 16 PERCENT OF OPSYS UK AT THIS TIME.

18 THE COURT: CDT, INC. THE MANAGEMENT CONTROLLED
19 98 PERCENT OF THE PROFITS, WE'RE GOING TO GO TO --

20 MR. ERICSON: THIS DID.

21 THE COURT: LIMITED?

22 MR. ERICSON: YES.

23 THE COURT: THOSE WERE THE MANAGEMENT CONTROL OF OPSYS
24 UK?

25 MR. ERICSON: RIGHT.

RJN 276

1 THE COURT: WHICH THEN BECAME CDC OXFORD LIMITED?

2 MR. ERICSON: RIGHT.

3 THE COURT: CDT OXFORD LIMITED STILL IN EXISTENCE?

4 MR. ERICSON: ALL THESE ENTITIES STILL IN EXISTENCE.

5 NOTHING BEEN LIQUIDATED THEY'RE ALL STILL IN EXISTENCE, THEY
6 MAY NOT HAVE OPERATIONS, THEY MAY NOT HAVE ASSETS, BUT THEY ALL
7 STILL EXIST AS CORPORATE ENTITIES.

8 THE COURT: AND, CDT LIMITED IS A WHOLLY OWNED
9 SUBSIDIARY OF CDT, INC.

10 MR. ERICSON: SECOND TIER WHOLLY OWNED SUBSIDIARY. AT
11 THE TOP IS CDC, INC., THIS IS A SELF-GRAPHIC, SORRY.

12 MR. BUNZEL: WE SHOULD HAVE A CAMERA.

13 MR. ERICSON: PROBABLY NOT. THE TOP WE HAVE CDT,
14 INC., THEN WE HAVE WHAT'S CALLED CDT HOLDINGS, THEN BELOW THAT
15 WE HAVE CDT LIMITED BUT WHOLLY OWNED. SO IT'S TWO TIERS DOWN
16 BUT WHOLLY OWNED, BUT INDIRECT WHOLLY OWNED.

17 THE COURT: WHERE IS CDT OXFORD LIMITED IN THIS?

18 MR. ERICSON: NOW, CDT OXFORD AND OPSYS ARE BOTH
19 WHOLLY OWNED SUBSIDIARY OF CDT LIMITED. SO YOU HAVE INC.,
20 HOLDINGS, LIMITED AND THEN THE TWO OPSYS ENTITIES.

21 THE COURT: THAT'S FOURTH TIER? RJN 277

22 MR. ERICSON: YES. THAT'S THE WAY IT IS TODAY AND IN
23 THE WAY IT'S BEEN SINCE ABOUT MAY OF 2005. IF YOU LIKE I CAN
24 GO THROUGH THE STEPS BEFORE THAT AND EXPLAIN THE STRUCTURE.

25 THE COURT: THAT WOULD REALLY HELP ME OUT OF THE

1 CONFUSION.

2 MR. ERICSON: LE ME SEE IF I CAN DO IT IN A WAY THAT
3 TRIES. THEY'RE COMPLICATED TRANSACTIONS, NO DOUBT ABOUT IT,
4 BUT LET ME SEE IF I CAN KEEP IT AS SIMPLE AS POSSIBLE.

5 WE HAVE THE '02 TRANSACTIONS, WE HAVE '04 AND '05,
6 AFTER THE '02 TRANSACTIONS CDT, INC., WHICH IS THE COMPANY I'M
7 REPRESENTING TODAY, OWNED 16 PERCENT OF OPSYS UK. THAT WAS THE
8 OWNERSHIP INTEREST.

9 IT DIDN'T OWN ANY OF OPSYS, IT DIDN'T HAVE ANY
10 MANAGEMENT RIGHTS OR ANYTHING LIKE THAT, IT OWNED 16 PERCENT OF
11 OPSYS UK.

12 CDT LIMITED THE SECOND TIER SUBJECT OF CDT HAD THESE
13 MANAGEMENT RIGHTS THAT YOUR HONOR REFERRED TO. THE RIGHT TO
14 MANAGE, TO 98 PERCENT OF THE PROFITS, WERE THERE EVER TO BE ANY
15 PROFITS AND SO ON, AND THAT WAS THE STRUCTURE FROM '02 TO '04.

16 THEN IN '04 SHORT COUPLE WEEKS AFTER THE IPO OF INC.
17 THAT POINT CDT, INC. OWNS 100 PERCENT OF OPSYS LIMITED. IT
18 STILL OWNS THE 16 PERCENT OF OPSYS UK AND CDT LIMITED STILL HAS
19 THE MANAGEMENT RIGHTS WITH RESPECT TO OPSYS UK. THAT'S THE
20 SITUATION FOR THE FIVE MONTHS OR SO UNTIL MAY OF 2005.

21 IN MAY OF 2005, BEAR IN MIND IT'S CDT LIMITED THAT'S A
22 DEFENDANT HERE IN THIS COURTROOM, HADN'T BEEN DISMISSED OUT YET
23 BY YOUR HONOR, SO AT THIS POINT THE INTERESTS WERE CHANGED, SO
24 THAT CDT, INC., I'M SORRY, CDT LIMITED OWNED 100 PERCENT OF
25 OPSYS LIMITED AND OWNED 100 PERCENT OF OPSYS UK AT THAT POINT,

1 AND FROM THAT POINT ON CDT, INC. DIDN'T OWN ANY PART OF EITHER
2 ENTITY AND DIDN'T HAVE ANYMORE, NEVER HAD MANAGEMENT RIGHTS OR
3 ANYTHING LIKE THAT.

4 SO FROM MAY '05 ON CDT, INC., THE ENTITY HERE TODAY,
5 HAS NO OWNERSHIP INTEREST, OR MANAGEMENT RIGHTS, OR ANYTHING
6 WITH RESPECT TO EITHER OF THE OPSYS ENTITIES.

7 THE COURT: BUT EARLIER YOU SAID AS A RESULT OF
8 TRANSACTION IN 2002, CDT, INC. OWNED 100 PERCENT OF OPSYS
9 LIMITED; IS THAT CORRECT?

10 MR. ERICSON: NO.

11 THE COURT: I MISUNDERSTAND YOU.

12 MR. ERICSON: CDT, INC. OWNED 16 PERCENT OF OPSYS UK,
13 IT OWNED NOTHING OF OPSYS LIMITED. THE POINT AT WHICH CDT,
14 INC. OWNED 100 PERCENT OF OPSYS LIMITED WAS FROM DECEMBER, I
15 THINK, IT'S THE 29TH OF '04 THROUGH MAY OF '05.

16 THE COURT: I SEE. OKAY. THEN WHAT HAPPENED?

17 FIRST OF ALL, HOW DID THAT HAPPEN? BY REASON OF
18 OPTIONS THAT IT HAD HELD OR HOW DID THAT HAPPEN?

19 MR. ERICSON: HOW DID IT HAPPEN INC. OWNED --

20 THE COURT: 100 PERCENT AS OF END OF '04.

21 MR. ERICSON: BY VIRTUE OF THE OPTIONS THAT WERE IN
22 THE '02 AGREEMENTS AS MODIFIED BY THE '04 SETTLEMENT AGREEMENT,
23 THE SHAREHOLDERS OF OPSYS LIMITED HAD THE RIGHT TO CAUSE CDT,
24 INC. TO BUY OPSYS LIMITED ON CERTAIN CONDITIONS. RJN 279

25 ONE OF THE MOST SALIENT ONES OF WHICH THE LIABILITIES

1 OF LIMITED BE BELOW CERTAIN LEVEL A MILLION 250 AND IF THOSE
2 CONDITIONS WERE MET AND PARTIES THOUGHT THEY WERE, THEY COULD
3 REQUIRE CDT, INC. TO BUY THE EQUITY IN OPSYS LIMITED AND THAT'S
4 WHAT OCCURRED, PURSUANT TO THOSE CONTRACTS.

5 BUT THEN THE STRUCTURE WAS SIMPLIFIED, AS I SAID, IN
6 MAY OF '05, SO THE CURRENT STRUCTURE WHERE WE HAVE BOTH OPSYS
7 ENTITIES BELOW CDT LIMITED, THEN TWO TIERS BELOW CDT, INC.

8 THE COURT: THAT'S THE STRUCTURE THAT STILL OBTAINS
9 TODAY?

10 MR. ERICSON: YES, STILL OBTAINS TODAY.

11 THE COURT: NOW, IN THE TRANSFERS TO OPSYS U.S. WERE
12 ALL U.S. ASSETS AND LIABILITIES TRANSFERRED?

13 MR. ERICSON: YES. THAT'S MY UNDERSTANDING, YES.
14 NOTHING WHATSOEVER IN THE U.S. EVER CAME TO ANY CDT ENTITY, FOR
15 THE REASONS WE EXPLAINED IN THE BLACK DECLARATION.

16 CDT HAD NO INTEREST IN ANY OF THE U.S. BUSINESS OF
17 OPSYS, IT WAS DIFFERENT TECHNOLOGY. IT WAS TECHNOLOGY THAT WAS
18 INVOLVED WITH KODAK, WHO IS THE SORT OF ARCHRIVAL OF CDT IN
19 THIS BUSINESS.

20 CDT WANTED NOTHING TO DO WITH THE AMERICAN BUSINESS.
21 WASN'T A CASE OF NOT WANTING LIABILITY OR BEING FOCUSED ON
22 LEASEHOLDS, IT WAS THE CASE THEY DIDN'T HAVE ANY INTEREST IN
23 THE BUSINESS IN THE UNITED STATES. **RJN 280**

24 IT WAS A DIFFERENT BUSINESS WITH DIFFERENT TECHNOLOGY,
25 TECHNOLOGY THAT DEPENDED ON A LICENSE FROM KODAK. TECHNOLOGY

1 THAT WAS GOING TO BE USED FOR MANUFACTURING BUSINESS.

2 CDT TOOK ONE LOOK AT THAT AND SAID WE HAVE NO INTEREST
3 IN THIS, WE DON'T THINK THIS IS A GOOD BUSINESS. IT WOULD PUT
4 US IN BED WITH KODAK. THEY'RE OUR ARCHRIVAL, WE HAVE COMPETING
5 TECHNOLOGY.

6 THEY NEVER EVER HAD ANY INTEREST IN THE U.S. ASSETS OF
7 OPSYS, THEREFORE, DIDN'T ACQUIRE ANY ASSETS, DIDN'T ACQUIRE ANY
8 LIABILITIES.

9 THE COURT: SO THE MANUFACTURING THAT WAS GOING ON IN
10 FREMONT WAS NOT MANUFACTURING OF TECHNOLOGY THAT HAD BEEN
11 RESEARCHED AND INVENTED BY OPSYS CDT WHOM, I GUESS, OPSYS AT
12 THAT POINT, OPSYS LIMITED, OPSYS UK.

13 MR. ERICSON: WHAT WENT ON IN FREMONT WAS
14 MANUFACTURING OR SORT OF PILOT MANUFACTURING THAT WAS BASED
15 ON -- I'M NOT SAYING OPSYS DIDN'T DO ANY WORK, BUT IT WAS
16 TECHNOLOGY BASED ON A LICENSE FROM KODAK IN DIFFERENT
17 TECHNOLOGY THEN THE CDT TECHNOLOGY. THAT'S WHY CDT DIDN'T WANT
18 TO HAVE ANYTHING TO DO WITH IT.

19 THE COURT: I THOUGHT MAY BE JUST A --

20 MR. BUNZEL: OXFORD AND CAMBRIDGE PEOPLE JUST WANTED
21 TO DO PURE RESEARCH AND NOT TOUCH THEIR FINGERS AND GET THEM
22 DIRTY ON THE MANUFACTURING. THAT'S NOT A GOOD THEORY, IS THAT
23 IT? RJN 281

24 MR. ERICSON: I'M NOT GOING TO STAND UP HERE AN ARGUE
25 IT WAS. THEY WERE SO IVORY TOWER THEY DIDN'T HAVE AN INTEREST

1 IN TRYING TO MAKE MONEY OR SOMETHING LIKE THAT.

2 THEY DIDN'T FEEL THE WAY TO DO IT WAS TO BECOME
3 INVOLVED IN KODAK. THEY CLEARLY WANTED TO MAKE MONEY, THEY
4 WANTED TO MAKE MONEY USING THEIR OWN BUSINESS MODEL, USING
5 THEY'RE OWN TECHNOLOGY, NOT HAVE ANYTHING TO DO WITH WHAT WAS
6 GOING ON IN THE UNITED STATES.

7 THE COURT: WELL, IS IT YOUR POSITION THAT SOMEHOW ALL
8 OF THESE TRANSACTIONS WERE ENGAGED IN SO AS TO AVOID LIABILITY
9 ON THE LEASE?

10 MR. BUNZEL: I THINK THERE'S, YES, IN A SENSE IN 2002
11 IT WAS UNDERSTOOD THAT OPSYS LIMITED HAD THIS LIABILITY AND
12 THAT IT WAS A REQUIREMENT OF THE CDT SIDE THAT LIABILITY NOT BE
13 ASSUMED.

14 THAT WAS PART OF THE GOAL THAT THE ASSIGNMENT WAS
15 GEARED TO AVOID SUCH A LIABILITY BEING IN THE BASKET OF ASSETS
16 AND LIABILITIES THAT A SUCCESSOR SUCH AS CDT MIGHT ACQUIRE.

17 AND THAT ULTIMATELY THEY WERE WRONG ABOUT THAT AND
18 THAT THIS LIABILITY IS A UK LIABILITY, THAT IT'S AN OPSYS
19 LIMITED LIABILITY. AND, INDEED, THAT'S THE EVIDENCE.

20 THE COURT: HOW DOES THAT HAPPEN?

RJN 282

21 YOU HAVE TO JUMP THROUGH, YOU KNOW, YOU HAVE TO JUMP
22 THROUGH ALL THOSE HOOPS WITH RESPECT TO SUCCESSOR LIABILITY.

23 FIRST OF ALL, THE -- AS I UNDERSTAND IT, THE ONLY
24 TRANSFER OF ASSETS THAT WENT ON HERE OTHER THAN WHAT MAY HAVE
25 BEEN TRANSFERRED TO OPSYS U.S. WAS THE TRANSFER FROM OPSYS

1 LIMITED TO OPSYS UK, RIGHT?

2 WERE THERE ANY OTHER TRANSFERS OF ASSETS?

3 MR. BUNZEL: YES, YOUR HONOR. THAT'S THE 2002
4 TRANSFER RIGHT AT THE TIME OF THE ASSIGNMENT NEGOTIATIONS. THE
5 ENGLISH COMPANY THAT'S THE DEBTOR HERE TOOK ALL OF ITS ASSETS
6 AND TRANSFERRED THEM TO AN ENTITY THAT COULD THEN BE CONTROLLED
7 AND ACQUIRED BY THE CAMBRIDGE SIDE, ONE ENTITY OR ANOTHER OF
8 CAMBRIDGE. THAT'S THE FIRST TRANSFER OF ASSETS.

9 THE SECOND TRANSFER OF ASSETS THAT'S IMPORTANT TO US
10 HERE OCCURS IN 2004 WHEN THEY CLOSED THE TRANSACTION AND ITS
11 STOCK GETS TRANSFERRED, ESSENTIALLY THE OWNERSHIP OF OPSYS
12 LIMITED BECOMES OWNED BY CDT, INC. HUNDRED PERCENT, SO THEY
13 TRANSFER ALL THEIR STOCK.

14 THE COURT: THAT'S NOT TRANSFER OF ASSETS, RIGHT?

15 MR. BUNZEL: IT'S A TRANSFER OF STOCK IN 2002. EXCUSE
16 ME, 2004.

17 THE COURT: I GUESS, YOU KNOW, JUST TO CUT TO THE
18 CHASE ON THIS. HOW DO YOU MEET ALL THOSE REQUIREMENTS OF RAY,
19 THE RAY CASE, BEATRICE THAT SPELL OUT HOW YOU, YOU KNOW, YOU
20 HAVE TO ESTABLISH SUCCESSOR LIABILITY?

21 FIRST OF ALL, THE PURCHASER OF THE ASSETS -- LET ME
22 ASK YOU THIS:

23 WHO IS THE PURCHASER OF THE ASSETS?

RJN 283

24 CDT PAYS THE MONEY, RIGHT?

25 BUT THE ASSETS ACTUALLY GET TRANSFERRED FROM, FIRST

1 FROM OPSYS TO OPSYS UK AND THEN TO CDT OXFORD, RIGHT?

2 MR. ERICSON: WELL, CDT OXFORD IS OPSYS, THEY JUST
3 CHANGED THE NAME.

4 THE COURT: EXCUSE ME?

5 MR. ERICSON: I THINK YOUR HONOR HAD EXACTLY RIGHT,
6 THE ASSETS MOVED FROM CDT LIMITED TO, I'M SORRY, FROM OPSYS
7 LIMITED TO OPSYS.

8 THE COURT: IT'S CONFUSING.

9 MR. ERICSON: IT IS AND THOSE NAME CHANGES DON'T HELP.
10 THEY REALLY DON'T, BUT THEN WHO ASKED US.

11 FROM OPSYS LIMITED TO OPSYS UK AND THERE THEY STAYED,
12 AND THE SUBSEQUENT TRANSACTIONS ARE NOT ASSET TRANSFERS,
13 THEY'RE BUYING AND SELLING STOCK, WHICH IS WHY THIS -- YOU'RE
14 RIGHT, THE DOCTRINE IS ELUCIDATED IN RAY AND OTHER CASES
15 DOESN'T APPLY HERE BECAUSE WERE NOT TRANSFERRING ASSETS AND
16 THEN DISSOLVING CORPORATIONS OR DOING QUASI MERGERS OR ANYTHING
17 LIKE THAT, THE ASSETS ARE SPUN OFF INTO OPSYS UK AND THERE THEY
18 STAY AND THERE THEY ARE.

19 THE COURT: BACKING UP, THOUGH, WHO IS, IN FACT, THE
20 PURCHASER WHEN THE PARTY THAT PAYS THE MONEY IS NOT THE
21 RECIPIENT OF THE TRANSFERS?

22 THE ASSETS ACTUALLY GO TO SOME OTHER PARTY, WHOSE THE
23 PURCHASER OF THAT?

24 PERSON THAT PARTY THAT PARTS WITH THE MONEY OR THE
25 PARTY RECIPIENT OF THE ASSETS?

RJN 284

1 MR. ERICSON: THE PARTY RECIPIENT OF THE ASSETS, I
2 THINK.

3 MR. BUNZEL: MY REACTION TO READING --

4 THE COURT: WAS THAT JUST GRATUITOUS PURCHASE?

5 MR. ERICSON: WELL, AS WE EXPLAIN, THE STRUCTURE
6 COMPLICATED LARGELY FOR TAX REASONS AND LARGELY FOR THE
7 BUSINESS REASONS.

8 I INDICATED EARLIER NO PART OF IT IS DESIRE TO DO HARM
9 TO CREDITORS OR ANYTHING LIKE THAT, BUT THEY HAD TAX
10 CONSIDERATIONS AND THEY, IN ESSENCE, THEY WANTED TO BUY AND
11 THEY HAD ASSETS THEY DIDN'T WANT TO BUY, THAT'S WHY IT'S
12 STRUCTURED THE WAY IT IS.

13 IT DOES NOT FIT THE SUCCESSOR LIABILITY MODEL BECAUSE
14 WE'RE NOT MOVING ASSETS INTO A SUCCESSOR AND WE'RE NOT
15 DISSOLVING THE ENTITY FROM WHICH IT CAME. NEITHER HAPPENS HERE
16 AND THERE'S ALSO NO ISSUE OF INADEQUATE CONSIDERATION FOR ANY
17 OF THIS.

18 THE FACTS OF RAY ARE SO STARK AND SO STARKLY DIFFERENT
19 THAN ANYTHING WE HAVE HERE. AND KIND OF IN RAY WE HAVE A LOT
20 ONE AND LOT TWO, OTHER THAN THEY'RE DIFFERENT CORPORATIONS IN
21 THE SECRETARY STATE SENSE EVERYTHING IS THE SAME.

22 THEY BUILD THE SAME LADDERS USING THE SAME FACTORIES
23 WITH THE SAME PEOPLE, WITH THE SAME SALES FORCE AND THE SAME
24 CUSTOMERS, AND THIS SAME LADDERS AND ALL WE HAVE IS THIS PAPER
25 CHANGE OF ENTITY WITH NOTHING ELSE CHANGES AND THERE'S AN

1 ATTEMPT TO ESCAPE LIABILITY ON THAT BASIS.

2 NOT IN ANY RESPECT WHAT HAPPENED HERE WITH RESPECT TO
3 THESE TRANSACTIONS. THE SUCCESSOR LIABILITY MODEL SIMPLY
4 DOESN'T FIT.

5 AS FOR THE OTHER MODEL ALTER EGO, THEY WOULD HAVE TO
6 SUCCEED ON ALTER EGO THEORY, THEY WOULD HAVE TO GO FROM OPSYS
7 TO CDT LIMITED TO CDT HOLDINGS TO GET TO CDT INC., YOU KNOW,
8 MULTIPLE PIERCING OF MULTIPLE VEILS, AS IT WERE.

9 BUT THE TROUBLE IS THE FIRST VEIL THEY HIT IS CDT
10 LIMITED AND THEY ALREADY MADE THEIR CLAIM AND THEY ALREADY LOST
11 IN THAT CLAIM AND YOUR HONOR DISMISSED IT WITH PREJUDICE. SO
12 THEY GET TO THE FIRST VEIL AND IT STOPS, SO ALL THREE NEITHER
13 THEORY SUCCEEDS FOR THE PLAINTIFF.

14 MR. BUNZEL: YOUR HONOR, IN TERMS OF THE PLEADINGS
15 THAT HAVE BEEN FILED BY THE DEFENDANT, WHICH WE HAVEN'T HAD A
16 CHANCE TO RESPOND TO, FACTUALLY OR LEGALLY, MY REACTION IN
17 READING IT WAS REMINDED ME OF THE THREE-CARD MONTE GAME, WHERE
18 ARE THE ASSETS, UNDER WHICH SHELL OF A CDT ENTITY DO THEY
19 RESIDE?

20 AND IT STRUCK ME THAT IN ORDER TO REALLY UNDERSTAND
21 EVERYTHING HERE WE NEED TO HAVE SOME DISCOVERY AGAINST ALL OF
22 THOSE CDT ENTITIES AND GET THE DOCUMENTS RELATED TO WHERE ARE
23 THE ASSETS AND HOW THEY ARE BEING EXPLOITED. RJN 286

24 AND IN RESPONSE TO YOUR QUESTION A MOMENT AGO ABOUT
25 WHAT TRANSFERS THERE WERE, THE THIRD TRANSFER WHICH I DIDN'T

1 GET IN AT THIS TIME IS THE 2005 TRANSFER. THIS IS IN 2005
2 DURING THE PENDENCY OF THIS CASE.

3 THE ONLY ASSET, AND IT'S AN ASSET, OKAY, HAS TO BE AN
4 OWNERSHIP INTEREST IN SUBSIDIARY, BUT IT'S THE ONLY ASSET OF
5 THE JUDGMENT DEBTOR HERE, WHICH WAS 84 PERCENT OWNERSHIP OF THE
6 IP FROM OPSYS. ALL OF THE IP NOT JUST UK, U.S. IP. ALL OF THE
7 IP, THAT'S PATENTS AND EVERYTHING ELSE THAT THE JUDGMENT DEBTOR
8 OWNED WENT DOWN AT OPSYS UK.

9 AND OPSYS LIMITED OWNED 84 PERCENT OF IT DURING THIS
10 CASE UNTIL MAY OF '05 WHEN FOR BUSINESS REASONS THAT AREN'T
11 EXPLAINED IN THE DECLARATIONS OTHER THAN TO FACILITATE
12 CORPORATE STRUCTURE AND FOR UNKNOWN CONSIDERATIONS, UNKNOWN
13 VALUE OF THE ASSETS, THOSE ASSETS NO LONGER BELONGED TO THE
14 JUDGMENT DEBTOR, SO THAT MY CLIENT CANNOT GO AND ENFORCE ITS
15 JUDGMENT AGAINST THOSE ASSETS. THAT'S A CLASSIC CASE.

16 THE COURT: YOU'RE REFERRING TO OPSYS LIMITED?

17 MR. BUNZEL: YES, OPSYS LIMITED OWNED 84 PERCENT OF
18 THE PATENTS. THEY HAD TRANSFERRED 98 PERCENT OF THE PROFITS
19 FROM THOSE PATENTS TO AN ENTITY OWNED BY CDT, INC.

20 BUT THE ASSETS THEMSELVES, THE VALUE OF THOSE ASSETS
21 BELONGED WITH THE JUDGMENT DEBTOR. 84 PERCENT SUBJECT TO
22 FORECLOSURE OF THIS JUDGMENT OR ENFORCEMENT OF THIS JUDGMENT IN
23 ENGLAND OR OTHERWISE UNTIL DURING THIS CASE THEY GOT
24 TRANSFERRED OUT. RJN 287

25 AND, I THINK, THAT UNDER THOSE CIRCUMSTANCES WE HAVE

1 EITHER A SUCCESSOR LIABILITY SITUATION OR BECAUSE ONE OF THE
2 ELEMENTS OF RAY IS A TRANSFER TO AVOID OBLIGATIONS TO CREDITORS
3 WHICH DOESN'T REQUIRE FRAUD.

4 IT'S JUST A TERM OF ART IN THE CIVIL CODE OR WE HAVE A
5 SECTION 18(B) FRAUDULENT CONVEYANCE CLAIM. AND, YOUR HONOR,
6 WHETHER THESE ARE STOCK TRANSACTIONS OR ASSET TRANSACTIONS, I
7 THINK, IT'S IMPORTANT BECAUSE MR. ERICSON IS RIGHT, MR. BARNES
8 IS RIGHT IN HIS PIECE OF PAPER, THE RAY FACTORS ARE GENERALLY
9 APPLIED TO ASSET TRANSACTIONS, NOT TO STOCK TRANSACTIONS.

10 AND THE REASON FOR THAT IN CALIFORNIA LAW IS VERY
11 SIMPLE. IF YOU OWN A HUNDRED PERCENT OF A COMPANY THAT
12 OPERATES AND YOU TRANSFER A HUNDRED PERCENT OF THAT STOCK TO
13 ME, THAT COMPANY THAT OPERATES CAN STILL PAY ITS CREDITORS AND
14 ITS TRADE CREDITORS, ITS JUDGMENT DEBTORS AND THE LIKE, AND THE
15 FACT THAT YOU AND I EXCHANGE OWNERSHIP INTEREST AT A TOP LEVEL
16 DOESN'T AFFECT THAT AT ALL.

17 UNDER THAT TYPE OF A STOCK TRANSACTION YOU DON'T HAVE
18 TO GET INTO WHETHER THERE'S BEEN AN ASSUMPTION OF LIABILITIES
19 BY THE SHAREHOLDERS WHO TRANSFERRED THE STOCK.

20 BUT HERE OPSYS LIMITED WENT OUT OF BUSINESS, IT
21 DOESN'T EXIST ANYMORE, ITS DOCUMENTS, ITS ASSETS, ITS
22 EMPLOYEES, ALONG WITH THIS CORPORATE HIERARCHY THROUGH A VERY
23 COMPLICATED SERIES OF STRUCTURES. **RJN 288**

24 AND IF YOU LOOK AT THE DESCRIPTION OF THESE
25 TRANSACTIONS IN THE 10K FILED WITH THE SEC IT STATES, AND THIS

1 IS AT THE AINSLIE DECLARATION EXHIBIT B, QUOTE "THE TERMS OF
2 THE TRANSACTION AGREEMENT RENDERED INTO BY THE COMPANIES, SO
3 THAT IT COULD GAIN CONTROL OF AN ECONOMIC INTEREST IN THE UK,
4 ASSETS AND OPERATION OF OPSYS" UNQUOTE AND AVOID CERTAIN
5 LIABILITIES.

6 THEY STRUCTURED AN ASSET PURCHASE ESSENTIALLY AS A
7 STOCK DEAL. AND IF ONE APPLIES THE RAY SET OF STANDARD FOR
8 SUCCESSOR LIABILITY IS EQUITABLE DOCTRINE. AND WE HAVE ALL THE
9 APPROPRIATE FACTS OR WITNESSES BEFORE THIS COURT FOR AN
10 EQUITABLE HEARING. I THINK, I CAN PROVE THAT IN APPLYING THE
11 RAY STANDARDS THAT THIS SITUATION IS TAILOR MADE FOR SUCCESSOR
12 LIABILITY.

13 OTHERWISE VERY CLEVER BUSINESSMEN COULD PUT TOGETHER A
14 DEAL TO OBTAIN THE ASSETS OF A COMPANY AND AVOID THE
15 LIABILITIES OF A COMPANY AND CALL IT A PURE STOCK DEAL. AND
16 THAT'S WHAT THEY'VE TRIED TO DO.

17 IT'S NOT APPROPRIATE AND THEY HAVE LEFT OUT THE MAJOR
18 CREDITOR OF THE ACQUIRED COMPANY OUT IN THE COLD ON PURPOSE NOW
19 AND CLAIMED THAT THE JUDGMENT DEBTOR THAT WE SPENT A MILLION
20 DOLLARS ESTABLISHING THE OBLIGATION, THEY SPENT A LOT MORE, NO
21 LONGER HAS ANY ASSETS BECAUSE THEY'VE BEEN ABSORBED BY
22 MR. ERICSON'S CLIENTS. RJN 289

23 IT'S NOT FAIR AND A SUCCESSOR LIABILITY DOCTRINE IS
24 EQUITABLE DOCTRINE. I HAVE TO GIVE IT TO THE DEFENDANTS, THEY
25 CREATED TRIABLE ISSUES OF FACT AND I THINK THAT IT'S PROBABLY

1 --

2 THE COURT: DON'T MENTION THAT.

3 MR. BUNZEL: AS MUCH AS I HATE TO SAY IT.

4 THE COURT: WE JUST WENT THROUGH THAT.

5 MR. BUNZEL: WE HAVE TO HAVE FURTHER PROCEEDINGS,
6 THEY'RE ALL EQUITABLE THEY DON'T REQUIRE A JURY, BUT THEY WILL
7 REQUIRE SOME EXPLANATION.

8 THE COURT: THAT'S EVEN WORSE.

9 MR. ERICSON: I'D LIKE TO RESPOND BRIEFLY TO A COUPLE
10 OF POINTS, I THINK, ARE MISAPPREHENSIONS REALLY.

11 FIRST OF ALL, TWO CHARACTERIZATION OF THE MAY 2005
12 TRANSACTIONS, THERE WAS, AT LEAST, AN INSINUATION AND MAYBE
13 MORE THIS WAS NEFARIOUS, IF NOT FRAUDULENT.

14 MR. BUNZEL: NOT WHAT I INTENDED.

15 MR. ERICSON: WELL, TALK ABOUT FRAUDULENT CONVEYANCE,
16 I HEARD THE WORD FRAUDULENT, BUT SOME INSINUATION THERE WAS
17 SOMETHING IMPROPER ABOUT THIS.

18 BUT LOOK AT WHAT HAPPENED. WE HAVE STOCK MOVING FROM
19 A NON-DEFENDANT TO A DEFENDANT, IS THAT THE WAY SOMEBODY MAKES
20 FRAUDULENT CONVEYANCE BY CONVEYING STOCK FROM A NON-PARTY TO A
21 DEFENDANT? RJN 290

22 NO, OF COURSE NOT. IF SOMEBODY WISHES TO PUT
23 SOMETHING OUT OF CREDITORS' REACH THEY DON'T CONVEY IT TO
24 SOMEONE WHO'S A DEFENDANT IN THE CASE. THEY DO EXACTLY THE
25 OPPOSITE, THEY CONVEY IT TO SOMEBODY IN THE SUNNY PLACE FOR

1 SHADY PEOPLE OR SOMETHING LIKE THAT, BUT THEY DON'T CONVEY
2 THINGS TO A DEFENDANT, YET THAT'S WHAT HAPPENED HERE.

3 AS I EXPLAINED EARLIER, THE EQUITY IN AN OPSYS LIMITED
4 WENT TO CDT LIMITED, AT THE TIME IT WAS A DEFENDANT IN THIS
5 CASE. SO I MEAN, THE NOTION THAT THIS WAS SOMEHOW CREDITOR
6 AVOIDANCE OR DESIGNED TO PREJUDICE SUNNYSIDE OR ANY OTHER
7 CREDITOR JUST FLOUNDERS ON THE FACTS, THE CONVEYANCES EITHER
8 BETWEEN PARTIES IN THIS CASE OR FROM NON-PARTIES TO PARTIES IN
9 THIS CASE AND THERE JUST NO WAY THAT CAN BE TO THE PREJUDICE OF
10 ANY CREDITOR.

11 SECOND POINT I WANT TO MAKE, WITH RESPECT TO THE
12 NOTION, THE ANALOGY THREE-CARD MONTE WAS USED. THREE-CARD
13 MONTE IS, AS I UNDERSTAND IT, SOME SORT OF GAME, THINGS GET
14 HIDDEN AND SO ON, THERE'S NOTHING HIDDEN HERE.

15 THE MONEY THAT WAS USED OR THE CONSIDERATION FOR THE
16 TRANSACTIONS IN 2004, THE CDT, INC. STOCK THAT WAS GIVEN FOR
17 THE 2004 TRANSACTION, SOMETHING ON THE ORDER OF 800, 900 SHARES
18 OF CDT, INC. STOCK, WHICH IS WORTH OF A LOT OF MONEY THEN AND
19 UNFORTUNATELY QUITE A BIT LESS MONEY TODAY, MOST OF THAT IS
20 STILL IN THE ESCROW OR IN WHAT'S CALLED OPSYS MANAGEMENT, IS
21 SORT OF ESCROW. **RJN 291**

22 IT'S NOT GONE TO THE FORMER SHAREHOLDERS OF OPSYS
23 LIMITED EXCEPT IN VERY SMALL AMOUNTS AND IN SATISFACTION OF
24 INDIVIDUAL CLAIMS THEY HAD. MOST OF IT IS STILL SITTING THERE
25 IN EITHER IN A FORMAL ESCROW OR IN SOMETHING THAT IS THE

1 EQUIVALENT OF AN ESCROW, THAT IS OPSYS MANAGEMENT STRUCTURE AND
2 IS AVAILABLE.

3 THE COURT: THAT CAN BE USED TO SATISFY ANY JUDGMENT
4 IN THIS CASE?

5 MR. ERICSON: I'M RELUCTANT TO SPEAK FOR ENTITIES I
6 DON'T REPRESENT THAT ARE, OBVIOUSLY, OF INTEREST SOMEWHAT
7 DIFFERENT THAN MY CLIENTS OWN INTEREST, SO I REALLY CANNOT
8 SPEAK DEFINITELY TO THAT.

9 BUT THE MONEY IS THERE, IT'S BASICALLY THERE FOR THE
10 SAKE OF CREDITORS. AND WHILE I CAN'T SAY WHETHER IT'S EASY OR
11 HARD OR SOMETHING, I DON'T KNOW THAT THERE'S ANYTHING THAT
12 PREVENTS MR. BUNZEL AND HIS CLIENT FROM LOOKING THROUGH OPSYS
13 MANAGEMENT.

14 AND THERE'S STILL SOMETHING ON THE ORDER OF, BETWEEN
15 THE ESCROW AND THE OPSYS MANAGEMENT, SOMETHING IN THE ORDER OF
16 700,000 SHARES OF CDT, INC. STOCK. UNFORTUNATELY NOT WORTH
17 WHAT IT ONCE WAS.

18 IT'S SITTING IN SORT OF ESCROW, SORT OF QUASI ESCROWS,
19 BASICALLY SITTING THERE BECAUSE OF CREDITOR CLAIMS AND THE
20 LIKE, NOT BEEN DISTRIBUTED TO THE FORMER SHAREHOLDERS OF OPSYS
21 LIMITED. I THINK, THAT'S REALLY WHERE THE PLAINTIFF OUGHT TO
22 BE LOOKING AND THAT WHAT THEY'RE ATTEMPTING TO DO HERE.

23 WHAT PLAINTIFF IS ATTEMPTING TO DO HERE IS SOMETHING
24 THAT JUST CANNOT BE FIT WITHIN ANY OF THESE DOCTRINES THEY
25 MENTIONED.

RJN 292

1 THE ALTER EGO WHICH ANALYTICALLY, AT LEAST, MAKES
2 SENSE, YOU CAN CONCEIVE HOW THERE CAN BE AN ALTER EGO CLAIM,
3 AND YOU CAN SORT OF TRY TO GO FROM ONE ENTITY TO THE NEXT.
4 ANALYTICALLY IT MAKES SENSE, FACTUALLY IT HITS A BRICK WALL.
5 THEY CAN'T GET PASSED OPSYS LIMITED, THEY TRIED, THEY LOST, THE
6 CLAIM WAS DISMISSED WITH PREJUDICE.

7 SO SAY ANALYTICALLY FACTUALLY I'M AFRAID DOESN'T WORK
8 FOR THEM, BUT SUCCESSOR LIABILITY SIMPLY IS NOT, AS A MATTER OF
9 LAW. I WOULD AGREE WITH MR. BUNZEL IN A SENSE THERE ARE PLENTY
10 OF FACTS THAT ONE COULD GET INTO IN DISCOVERY, PLENTY OF
11 FURTHER PROCEEDINGS AND SO ON, THAT ONE WOULD HAVE TO GO
12 THROUGH BEFORE ONE COULD EVER REACH A DECISION ADVERSE TO MY
13 CLIENT.

14 BUT YOU DON'T HAVE TO GO THERE AS A MATTER OF LAW, THE
15 DOCTRINE SIMPLY DOESN'T WORK. THE DOCTRINE APPLIES TO
16 TRANSFERS OF ASSETS SUCH AS THE POTLATCH CASE SAYS. THERE
17 AREN'T TRANSFER OF ASSETS HERE, NOT TO MY CLIENT. AS I SAID
18 EARLIER, THE ASSETS ARE STILL WITH OPSYS UK.

19 THE DOCTRINE APPLIES WHERE THE TRANSFEROR HAS BEEN
20 DISSOLVED, IT'S NOT HAPPENED HERE, THESE ENTITIES HAVE NOT BEEN
21 DISSOLVED. THE DOCTRINE APPLIES ONLY WHERE THE CONSIDERATION
22 IS INADEQUATE OR THE TRANSACTION ESSENTIALLY SHAM BECAUSE
23 THEY'RE NOT ARMS-LENGTH IN CONSIDERATION, WASN'T FAIR AND
24 ADEQUATE. RJN 293

25 THE COURT: I'LL PICK UP ON THAT IN JUST A MOMENT,

1 BUT -- AND ASK MR. BUNZEL ABOUT THAT, BUT WHAT ABOUT THIS
2 ARGUMENT THAT WHILE, -- WELL, THIS IS A SUCCESSOR LIABILITY, IS
3 REALLY AN EQUITABLE DOCTRINE AND IT DOESN'T HAVE TO BE CONFINED
4 TO A TRANSFER OF ASSETS, COULD BE INVOLVED TRANSFER OF STOCK OR
5 ESSENTIALLY IF, FOR EXAMPLE, IF IT'S A HOLDING COMPANY, THAT
6 MAYBE ALL THAT A HOLDING COMPANY HAS.

7 MR. ERICSON: YES, IT IS EQUITABLE, I AGREE WITH THAT
8 PART. I DO NOT AGREE THAT IT APPLIES TO A TRANSFER OF STOCK.
9 THAT WAS THE HOLDING OF THE POTLATCH CASE WE CITE, 154 CAL APP.
10 AT 1150 DOES NOT APPLY TO STOCK DEALS, IT ONLY APPLIES TO ASSET
11 TRANSFERS.

12 SO EQUITABLE DOESN'T MEAN ELASTICITY, MEANS EQUITABLE.
13 CLEAR CALIFORNIA LAW SAYS THAT DOESN'T APPLY TO STOCK
14 TRANSFERS.

15 MR. BUNZEL: IN PHILLIPS AND POTLATCH THE UNDERLYING
16 COMPANY DEBTOR WHO'S STOCK WAS TRANSFERRED REMAINED IN
17 EXISTENCE, THAT WAS THE TOUCHSTONE OF THOSE HOLDINGS.

18 THAT'S WHY GENERALLY THE RAY FACTORS AREN'T APPLIED
19 UNDER THOSE CIRCUMSTANCES. YOU HAVE AN EXISTING COMPANY TO
20 PURSUE, WE FOUND OUT, AND I TAKE MR. ERICSON --

21 THE COURT: WOULDN'T YOU HAVE TO, IN FACT, ESTABLISH
22 AND, IN FACT, YOU DON'T HAVE A COMPANY TO PURSUE BEFORE YOU
23 COULD, THEN IF YOU TAKE YOUR THEORY THEN YOU HAVE TO TRY TO
24 RECOVER JUDGMENT FROM OPSYS LIMITED AND THEN AND ONLY THEN
25 SUCCESSFUL IN THE RECOVERY FROM THEM PURSUE ANY SUCCESSOR

RJN 294

1 LIABILITY.

2 MR. BUNZEL: YOUR HONOR, THE CEO OF THE PUBLIC COMPANY
3 CDT, INC. STATED TO ITS SHAREHOLDERS AND TO THE INVESTING
4 PUBLIC WITHIN DAYS AFTER THE VERDICT IN THIS CASE THAT OPSYS
5 LIMITED QUOTE "HAS NO ASSETS" UNQUOTE.

6 IT WENT ONTO SAY THEY WEREN'T GOING TO HELP FUND THE
7 SETTLEMENT, THAT'S NEITHER HERE NOR THERE. IT WAS NEWS TO ME
8 HAVING BEEN WITH THIS CASE FOR A YEAR AND A HALF THAT THIS 84
9 PERCENT INTEREST IN THE INTELLECTUAL PROPERTY NO LONGER RESIDES
10 WITH THE JUDGMENT DEBTOR, IT HAPPENED DURING THE PENDENCY OF
11 THIS CASE.

12 I UNDERSTAND MR. ERICSON'S ARGUMENT THAT TRANSFER WAS
13 TO CDT LIMITED, IT WAS BEFORE THE COURT, BUT IT WAS A WAY FROM
14 THE CONTRACT DEFENDANT, THE OBVIOUS PRIMARY DEFENDANT IN THIS
15 CASE DURING THIS CASE. SO THEIR SIDE IS STATING PUBLICLY THAT
16 THE JUDGMENT DEBTOR HAS NO ASSETS, I TAKE THEM AT THEIR WORD
17 FOR THAT.

18 THE COURT: THAT'S SOMETHING YOU READ IN THE
19 NEWSPAPER, RIGHT?

20 MR. BUNZEL: I READ IT IN A PRESS RELEASE FILED WITH
21 THE SECURITY AND EXCHANGE COMMISSION. I BELIEVE IT WAS FILED
22 WITH THE SECURITIES EXCHANGE COMMISSION, YOUR HONOR.

23 THE COURT: I'M NOT SURE IT'S A GOOD IDEA TO RELY ON
24 PRESS RELEASE. RJN 295

25 MR. BUNZEL: WHILE I'M NOT ACCUSING ANY PARTIES OF

1 HIDING THINGS HERE AND --

2 THE COURT: I THOUGHT YOU WERE.

3 MR. BUNZEL: NO, I'M NOT. FRAUDULENT CONVEYANCE.

4 THE COURT: THREE-CARD MONTE AND ALL THAT, I THOUGHT
5 THAT'S ALL ABOUT SHUFFLE THINGS AROUND.

6 MR. BUNZEL: A LOT OF COMPLEXITY DESIGNED TO AVOID
7 ASSUMPTION OF LIABILITIES. INDEED, MR. BLACK'S DECLARATION
8 STATES AT THE -- THAT THE ONLY REASON THIS WASN'T AN ASSET DEAL
9 WAS TO -- BECAUSE OF TAX CONSEQUENCES AND THE BASIS OF THE IP
10 ASSETS THAT THEY STRUCTURED IT AS A STOCK TRANSACTION FOR TAX
11 REASONS.

12 SO THERE'S A LOT OF COMPLEXITY THERE. THERE WAS A
13 STATEMENT MADE IN DECEMBER OF 2005 THAT OPSYS LIMITED ASSETS
14 REMAIN AVAILABLE TO SATISFY LIABILITIES AT THAT POINT DECEMBER
15 OF 2005, JUST AS THEY WERE BEFORE THE TRANSACTION. THAT WAS
16 FROM OPSYS LIMITED.

17 THAT'S, I ASSUME, THAT THAT STATEMENT WAS NOT
18 INTENTIONALLY MISLEADING, BUT IT IS INACCURATE. WE NOW KNOW IN
19 MAY OF 2005 EVERYTHING THAT OPSYS LIMITED OWNED WENT OUT THE
20 WINDOW AND WE CONTINUE TO LITIGATE THIS CASE AT ENORMOUS
21 EXPENSE.

22 NOBODY TOLD US THAT AND I BELIEVE THAT THOSE ASSETS
23 ARE BEING UTILIZED BY THE DEFENDANTS WITH SYNERGIST AND THE
24 LIKE, AS THEY SAY IN THEIR PUBLIC FILE, TO SUPPORT PROFITS AND
25 SHARE PRICE AND VALUE AND EVERYTHING ELSE. **RJN 296**

1 WITH RESPECT TO THE ESCROW, YOUR HONOR, THE REASON CDT
2 NEEDS TO BE A PARTY IS THAT CDT AND/OR ONE OF THE ITS CELL
3 ENTITIES ARE THE PARTIES TO THAT AGREEMENT WITH THE FORMER
4 OPSYS SHAREHOLDERS, WE AREN'T. THEY HAVE RIGHTS WITH RESPECT
5 TO THOSE SHARES, TO FORCE THOSE SHARES TO BE SOLD TO SATISFY
6 OPSYS LIMITED LIABILITIES.

7 SO WE NEED CDT IN THIS CASE TO CAUSE THAT TO HAPPEN.
8 I HAD THE FOLLOWING THOUGHT ABOUT WHERE TO GO WITH THIS AND I
9 KNOW THAT BOTH OF THE DEFENDANTS SUGGESTED THAT SOME FURTHER
10 PLEADING MIGHT BE NEEDED.

11 I DON'T KNOW IF THE COURT BELIEVES THAT WOULD BE
12 HELPFUL, BUT WE COULD PREPARE A SHORT SUPPLEMENTAL COMPLAINT TO
13 THE CURRENT COMPLAINT, NOT ADDING MORE THAN TWO OR THREE PAGES
14 WOULD BE MY GOAL, AND THEN SET IT FOR FURTHER STATUS
15 CONFERENCE, IF YOU THINK THAT WOULD BE HELPFUL.

16 THE COURT: I WANT TO GO BACK TO SOMETHING THAT
17 MR. ERICSON ALSO TALKED ABOUT AND THAT WAS ADEQUACY OF
18 CONSIDERATION.

RJN 297

19 MR. BUNZEL: YES.

20 THE COURT: WHAT IS THE EVIDENCE THAT THE
21 CONSIDERATION THAT INVOLVED THIS TRANSFER WAS INADEQUATE?

22 MR. BUNZEL: WE'VE PUT THAT IN MR. AINSLIE'S
23 DECLARATION, HE'S SUMMARIZING PUBLICLY FILED DOCUMENTS IN 2002.
24 THE LIABILITIES OF OPSYS LIMITED WERE APPROXIMATELY \$17 MILLION
25 BRITISH POUNDS, WHICH DID NOT INCLUDE RECOGNITION OF THE

1 LIABILITY TO MY CLIENT, SO MAKE IT \$22 MILLION-POUND OR SOME
2 SUCH NUMBER IF YOU ADD THIS ONE.

3 AND THE ONLY CASH THAT WENT TO OPSYS LIMITED ITSELF
4 WAS \$5 MILLION, WHICH WAS \$2 MILLION FOR A TECHNOLOGY LICENSE,
5 \$500,000 FOR THE OPTION RIGHTS AND \$2 MILLION TO SATISFY
6 CERTAIN LIABILITIES.

7 SO THEY PUT \$2 MILLION TO LIABILITY SATISFACTION AS I
8 SEE IT AND OBTAINED ASSETS THAT THEY VALUED AT BETWEEN 19 AND
9 \$26 MILLION AND I DON'T THINK THAT'S ADEQUATE CONSIDERATION.

10 THE GOAL OF THIS IF YOU LOOK AT IT GLOBALLY, WAS THAT
11 VALUE FROM THESE ASSETS, WHATEVER THEY WERE WORTH WOULD GET TO
12 THE OPSYS SHAREHOLDERS, AND IT'S BEEN SOMEWHAT HELD UP BECAUSE
13 OF THIS LAWSUIT AND THE ESCROW AND THE LIKE, AND DR. READY'S
14 LAWSUIT.

15 BUT VALUE WOULD GET TO THE SHAREHOLDERS AND WOULD
16 BYPASS, AT LEAST, MY CLIENT AS A CONTINGENT CREDITOR. THEY
17 SECURED THAT POSSIBILITY WITH SOME ESCROW SHARES, THEY DIDN'T
18 SECURE IT ENOUGH TO COVER THIS LIABILITY, AND AS A CONSEQUENCE
19 I THINK HAVING RETAINED THE ASSETS AND ONLY PUT IN \$2 MILLION
20 OR SO TOWARDS SATISFACTION OF LIABILITIES YOU HAVE A CLASSIC
21 CASE WHERE THERE ARE EXCESS LIABILITIES OVER THE CONTRIBUTION
22 FROM THE ACQUIRING COMPANY.

23 THE COURT: WELL, DOESN'T HAVE TO BE SOME KIND OF
24 CAUSAL RELATIONSHIP, HOWEVER, BETWEEN YOU TWO, THE ACQUISITION
25 OCCURRED AND THE ACQUISITION OF ASSETS AND THE PREDECESSORS

RJN 298

1 INABILITY TO PAY THOSE DEBTS?

2 MR. BUNZEL: I DON'T KNOW, YOUR HONOR.

3 THE COURT: DOESN'T THAT HAVE TO BE RELATIONSHIP, NOT
4 JUST THEY CAN'T PAY THEIR DEBTS, HAVE TO BE A RELATIONSHIP
5 BETWEEN THE ACQUISITION AND THE INABILITY TO PAY?

6 MR. BUNZEL: AND, I THINK, IF THAT IS THE PART OF THE
7 TEST HERE THERE IS A CAUSAL RELATIONSHIP. IF YOU READ ALL OF
8 THESE TRANSACTIONS TOGETHER, THE INTELLECTUAL PROPERTY AND THE
9 PATENTS WHICH WERE WORTH SOME SUM OF MONEY TO THE CAMBRIDGE
10 PEOPLE IN TERMS OF THE STOCK HAVE A -- THEY VALUED IT IS LONGER
11 THERE, SO THAT THE INABILITY --

12 THE COURT: WHERE IS THAT? WHO OWNS --

13 MR. ERICSON: THE IP'S WHERE IT'S BEEN SINCE 1992 IN
14 THE HAND OF OPSYS UK. HASN'T GONE ANYWHERE.

15 THE COURT: THERE 1992.

16 MR. ERICSON: 2002 YOU GET PAST A CERTAIN AGE ALL THE
17 DECADES RUN TOGETHER, I MEANT 2002.

18 MR. BUNZEL: THAT'S THE SUBSIDIARY THAT ALL THE IP WAS
19 PUSHED DOWN INTO WHICH IS NO LONGER OWNED.

20 THE COURT: WHICH IS NOW CDT OXFORD?

21 MR. ERICSON: RIGHT.

22 MR. BUNZEL: NO LONGER OWNED BY MY CLIENT, ACTUALLY,
23 BY THE JUDGMENT DEBTOR TO MY CLIENT.

24 THE COURT: YOU'RE SUING YOURSELF. OKAY. ANYTHING
25 ELSE ON THIS ISSUE?

RJN 299

1 MR. ERICSON: VERY QUICKLY ON THAT. I DON'T THINK
2 THERE'S ANY THEORY THAT CDT UNDERPAID. IT PAID AN AMOUNT, THAT
3 BOOK SHOW TO BE VASTLY IN EXCESS OF BOOK VALUE OF THAT WHICH IT
4 GOT WAS TREMENDOUS AMOUNT OF GOOD WILL THAT WAS PUT ON THE
5 BOOKS BECAUSE THE PRICE PAID FOR THESE ENTITIES WAS AT LEAST
6 DOUBLE THEIR BOOK VALUE.

7 AND THE RULE HE SUGGESTING IS, I THINK, FOR THE
8 REASONS YOUR HONOR MENTIONED, JUST COMPLETELY WRONG. THE IDEA
9 THAT YOU CAN'T BUY SOMETHING FROM, YOU CAN'T BUY A CORPORATION
10 OR YOU CAN'T BUY SOMETHING FROM A CORPORATION UNLESS YOU PAY AN
11 AMOUNT SUFFICIENT TO COVER ALL THEIR LIABILITIES, THERE'S NO
12 BASIS IN LAW FOR THAT SORT OF ARGUMENT.

13 YOU CAN'T UNDERPAY FOR THE ASSETS, THERE'S NO RULE OF
14 LAW YOU HAVE TO BE DADDY WARBUCKS AND PAYOFF ALL THEIR OTHER
15 CREDITORS TO APPLY SOMETHING FROM LIMITED.

16 YOUR HONOR PUT YOUR FINGER ON IT, THE ONLY REAL ISSUE
17 YOU MAKE YOUR CREDITORS WORSE OFF. THERE'S NO WAY CDT MADE
18 OPSYS CREDITORS WORSE OFF BY PUTTING MONEY INTO OPSYS, BY
19 PUTTING A LOT OF CDT STOCK WHICH IS VALUE IN THERE. AND AS I
20 SAID, ALMOST ALL THE CDT STOCK IS STILL SITTING THERE IN ESCROW
21 OR IN OPSYS MANAGEMENT, IT'S NOT GONE WITH THE WIND OR
22 DISAPPEARED OR ANYTHING.

23 THE COURT: IS THERE ENOUGH TO COVER THE JUDGMENT IN
24 THE CASE? RJN 300

25 MR. ERICSON: IF THE CURRENT STOCK PRICE, I DON'T

1 THINK THERE IS. I THINK, REASON SIGNIFICANT PART OF IT, I
2 THINK THE CURRENT PRICE OF CDT STOCK, I DON'T THINK SO. I
3 THINK WHAT I SAID EARLIER ON THE ORDER OF 700,000 SHARES, I
4 HAVEN'T CHECKED THE STOCK PRICE IN THE LAST FEW DAYS, BUT I
5 THINK IT WAS FIVE OR SOMETHING LIKE THAT LAST TIME I LOOKED.
6 SO THAT WOULD BE 3 1/2 NOT 4.8, BUT THERE ARE OBVIOUSLY OTHER
7 CLAIMANTS INCLUDING EASTMAN KODAK AS IDENTIFIED IN OUR PAPERS.

8 THE POINT THIS IS NOT SOME SORT OF STRUCTURE WHERE
9 SOME PEOPLE STUCK THE MONEY IN THEIR POCKET AND SNUCK OFF IN
10 THE DARK OF NIGHT, IT'S A CONSIDERATION PAID IN FOR THESE
11 ENTITIES IS STILL SITTING THERE IN THESE ESCROWS.

12 BUT, AGAIN, I JUST THINK THERE IS NO CREDIBLE THEORY
13 ADVANCED THAT CONSIDERATION OF WHAT WERE VERY MUCH ARMS-LENGTH
14 TRANSACTIONS, HEAVILY DOCUMENTED, HEAVILY NEGOTIATED, GOOD LAW
15 FIRMS ON BOTH SIDES AND SO ON, ON ALL RESPECTS ARMS-LENGTH, NO
16 CREDIBLE THEORY OR CREDIBLE EVIDENCE THE CONSIDERATION PAID FOR
17 ANYTHING WAS INADEQUATE BY ANY TEST.

18 THE COURT: NOW, WERE IT NOT FOR THE EARLIER DISMISSAL
19 WITH RESPECT TO CDT LIMITED, WOULD THERE BE BASIS FOR PURSUING
20 CDT LIMITED?

21 MR. BUNZEL: YOUR HONOR, MY READING OF DISMISSAL WITH
22 PREJUDICE.

23 THE COURT: WERE IT NOT FOR THAT. IS THERE SOME
24 THEORY? RJN 301

25 MR. BUNZEL: I THINK, GIVEN THE PRESENTATION, AS I

1 SAID EARLIER, BY MR. ERICSON'S CLIENTS ABOUT THE INVOLVEMENT OF
2 ALL OF THESE ENTITIES, THAT IS CDT LIMITED, CDT OXFORD LIMITED
3 WHICH IS FORMERLY OPSYS UK, CDT, INC. AND I DON'T KNOW WHAT
4 ABOUT THE PASSIVE HOLDING COMPANY IT'S IN THE MIDDLE.

5 THE COURT: JUST SWEEP THEM ALL IN THERE, IS THAT YOUR
6 THEORY?

7 MR. BUNZEL: WE MAY NEED DISCOVERY WITH RESPECT TO ALL
8 OF THEM. IF THEIR POSITION IS THAT EACH ONE OF THESE IS AN
9 INSULATING LAYER AND HAS NO ASSETS, THEN THAT'S A PROBLEM AND I
10 THINK WE NEED TO ADDRESS HAVING ALL OF THEM BEFORE THE COURT OR
11 AT LEAST FOR PURPOSES OF DISCOVERY.

12 I DON'T BELIEVE THE CDT LIMITED WERE DISMISSED FOR
13 WHATEVER THE CLAIM WAS INTERFERING WITH CONTRACT OR FRAUD, THAT
14 IT WOULD BE INAPPROPRIATE TO HAVE THEM ON A POST VERDICT BASIS
15 BE A PARTY TO AID THE ENFORCEMENT OF A JUDGMENT UNDER RULE 25
16 OR 69.

17 I THINK THAT WOULD -- IT'S NOT BARRED, YOUR HONOR, I'M
18 NOT TRYING TO COMPLICATE THE MATTER, BUT IT'S A COMPLICATED
19 SERIES OF TRANSACTIONS THEY'RE DESCRIBING. YOU ASKED IF THERE
20 WAS ANYTHING FURTHER ON THIS AND --

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21 THE COURT: THAT MAY HAVE BEEN A MISTAKE.

22 MR. BUNZEL: WELL, I'M SORRY. YOU'RE PROBABLY RIGHT,
23 BUT WE DID BRING UP IN OUR MOTION PAPERS BECAUSE THE DEFENDANTS
24 ARE CORRECT, THAT OBVIOUSLY DUE PROCESS IS IMPLICATED IN A
25 POST-JUDGEMENT OR POST-VERDICT MOTION SUCH AS THIS AND WE

1 BROUGHT UP THE FACTS SUCH AS WE KNOW THEM ABOUT CONTROL OF THE
2 LITIGATION, AND THERE WAS A STATEMENT FOR THE FIRST TIME, AS
3 FAR AS I KNOW, MY CLIENT KNOWS THAT OPSYS LIMITED HAS SOMEHOW
4 DIRECTED THIS LITIGATION THROUGH A DIRECTOR OF OPSYS LIMITED
5 MR. BLACK.

6 MR. BLACK IS ALSO AN OFFICER OF CAMBRIDGE AND THE
7 OPERATING COMPANY, I BELIEVE THE PUBLIC COMPANY AS WELL, AND IN
8 THE MEETINGS HE DESCRIBES -- IN WHICH HE SAYS HE WAS WEARING
9 HIS OPSYS LIMITED HAT, THE BUSINESS CARD THAT HE PASSED OUT TO
10 MY CLIENT WAS WITH HIS CAMBRIDGE HAT, IF THAT'S AT ALL RELEVANT
11 TO THE COURT I HAVE THOSE MATERIALS. BUT.

12 THE COURT: NOW WE'RE GOING TO DECIDE THINGS ON THE
13 BASIS OF SOMEBODY'S BUSINESS CARD?

14 MR. BUNZEL: I -- NO, BUT AS TO A FACTOR WITH RESPECT
15 TO DUE PROCESS THERE'S REALLY NO QUESTION CAMBRIDGE ON NOTICE
16 OF THIS LITIGATION, THAT THEY CERTAINLY HAVE DIRECTED, AT
17 LEAST, SETTLEMENT, I BELIEVE, THEY PROBABLY DIRECTED MORE THAN
18 THIS WITH RESPECT TO THIS LITIGATION AND TO COME IN AND THEN
19 SAY THIS COMPANY THAT HAS NO ASSETS.

20 MR. LICHTERMAN: I'M GOING TO OBJECT TO THIS ON THE
21 GROUND ITS ATTEMPT TO USE SETTLEMENT DISCUSSION TO ESTABLISH
22 LIABILITY, FEDERAL RULE OF EVIDENCE 408. RJN 303

23 MR. BUNZEL: WE'RE CERTAINLY NOT DOING THAT. THE CASE
24 LAW INDICATES THAT WITH RESPECT TO SUCCESSOR LIABILITY CONTROL
25 OR PARTICIPATION IN SETTLEMENT DISCUSSIONS IS ONE OF THE

1 FACTORS AND BOTH MR. ERICSON'S CLIENTS --

2 THE COURT: WE'RE NOT TALKING ABOUT THE SUBSTANCE OF.

3 MR. LICHTERMAN: I DON'T THINK IT'S EVER BEEN
4 ADDRESSED.

5 MR. BUNZEL: BOTH MR. ERICSON'S CLIENTS AND MY PIECE
6 OF PAPER REFERENCE THESE MEETINGS AND THEY DON'T TALK ABOUT THE
7 SUBSTANCE OUT OF RESPECT TO THE FEDERAL RULES.

8 BUT THE PARTICIPANTS, THERE WERE PARTICIPANTS FROM
9 CAMBRIDGE THEY HAVE BEEN ON NOTICE OF THIS CLAIM FOR SOME TIME
10 AND HAVE PARTICIPATED WITH RESPECT TO ITS DIRECTION AND I THINK
11 THAT'S RELEVANT TO THE DUE PROCESS CONSIDERATIONS THAT ARE
12 IMPLICATED HERE.

13 I'M NOT SURE WOULD SATISFY TO THE POINT OF GRANTING
14 OUR MOTION, YOUR HONOR, WITHOUT AN EVIDENTIARY HEARING UNDER
15 THE LUX LINER CASE, HOWEVER.

16 THE COURT: OKAY.

17 MR. ERICSON: ONE POINT.

18 THE COURT: VERY BRIEFLY.

19 MR. ERICSON: MR. BUNZEL SUGGESTED THAT THE DISMISSAL
20 IN AUGUST '05 OF CDT LIMITED WAS ON SOME GROUND THAT'S NO
21 LONGER OPERATIVE, BUT I THINK IF YOU CHECKED, YOUR HONOR, THAT
22 THE RECORD WILL REFLECT THAT WHAT WAS ASSERTED WAS ALTER EGO
23 CLAIM AND THAT WAS DISMISSED WITH PREJUDICE, WHICH IS EXACTLY
24 THE POINT I MADE EARLIER. RJN 304

25 THEY CANNOT NOW SEEK TO PURSUE ALTER EGO THROUGH

1 LIMITED TO GET AT OTHER ENTITIES SUCH AS CDT, INC. BECAUSE THEY
2 ALREADY TRIED AND LOST THAT. IT WAS DISMISSED WITH PREJUDICE
3 EXACTLY THE SAME THING ALTER EGO.

4 THE COURT: WHAT EFFECT WOULD THAT HAVE ON A SUCCESSOR
5 LIABILITY CLAIM? WHERE THE THEORY IS DIFFERENT FROM --

6 MR. ERICSON: IT'S A DIFFERENT THEORY.

7 THE COURT: THEN ALTER EGO, CERTAINLY NOT UNRELATED,
8 CERTAINLY NOT THE SAME.

9 MR. ERICSON: IT'S A DIFFERENT THEORY, IT WASN'T
10 RAISED, SO WE CONCEDE THOSE POINTS. I THINK, ONE WOULD HAVE TO
11 THINK MORE THAN I THOUGHT ABOUT WHAT RES JUDICATA MEANS IN THIS
12 CONTEXT AND WHETHER THE BAR GOES BEYOND THE EXACT LEGAL THEORY
13 ADVANCED TO RELATED THEORIES THAT COULD HAVE BEEN.

14 THE COURT: WHY NOT WE HAD EVERY OTHER THEORY IN THE
15 BOOK IN THE CASE, THAT WAS SUPPOSEDLY A BREACH OF CONTRACT
16 CASE, WHY NOT ADD ONE MORE? RES JUDICATA, TAKE A LITTLE
17 COLLATERAL ESTOPPEL, A LITTLE WHATEVER.

18 MR. BURNS: YOUR HONOR, AT THE RISK OF CONFUSING THIS
19 A BIT MORE OPSYS LIMITED MY CLIENT --

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20 THE COURT: THAT'S YOU, YES.

21 MR. BURNS: ALSO FILED AN OPPOSITION TO THIS RULE 25
22 AND WE WOULD RESPECTFULLY REQUEST AND SUGGEST TO THE COURT THAT
23 THE PROPER PROCEDURE AT THIS POINT IS A NEW COMPLAINT, NOT
24 COMPLAINT IN THE CASE THAT WE'VE JUST TRIED, BUT RATHER A BRAND
25 NEW COMPLAINT COMPLETELY BECAUSE RULE 25 RESPECTFULLY DOES NOT

1 APPLY AND WE WOULD PUT THAT BEFORE THE COURT AND SUGGEST THAT
2 IF THEY WISH TO PROCEED PLAINTIFFS WE CAN'T STOP THEM, BUT THAT
3 SHOULD BE IN A NEW CASE.

4 THE COURT: THEN IT'S NOT RELATED. GIVE SOMEBODY ELSE
5 A HEADACHE.

6 MR. BUNZEL: I THINK THAT'S FORM OVER SUBSTANCE.

7 THE COURT: OKAY. WELL, MATTERS SUBMITTED UNTIL
8 ANOTHER DAY. OKAY. AND WE'LL FIGURE OUT WHAT WE'RE GOING TO
9 DO WITH IT, IT IS A BIT OF A MESS.

10 MR. ERICSON: THANK YOU.

11 MR. BUNZEL: YOUR HONOR, IF WE ARE NOT ON HERE FOR A
12 STATUS CONFERENCE, ONE OF THE THINGS THAT PLAINTIFF WOULD LIKE
13 TO DO AND I KNOW THAT WE'RE COMPLICATING THE MATTER, PERHAPS,
14 BY THE POST-TRIAL MOTIONS EXCUSE ME, IT'S GETTING --

15 THE COURT: GOING ON.

16 MR. BUNZEL: -- IT'S GETTING TIRESOME, IS THE ENTRY OF
17 A JUDGMENT. AND I JUST WANTED TO REMIND YOUR HONOR THAT IN
18 MIDDLE OF MARCH WE SUBMITTED AS AN EXHIBIT TO A POST STATUS
19 PACKAGE, A PROPOSED FORM OF JUDGMENT, AND I'M SURE THAT AT THE
20 TIME THE COURT BELIEVES IT'S APPROPRIATE TO ENTER A FORM OF
21 JUDGMENT WITH OR WITHOUT RULE 54 YOU WILL DO SO.

22 I WANTED TO BRING THAT UP AGAIN, BECAUSE IT IS IN THE
23 ABSENCE OF THAT JUDGMENT I BELIEVE WERE NOT ACCRUING INTEREST
24 SOME NUMBER IN EXCESS OF \$30,000 A DAY, SO IT'S IMPORTANT TO
25 MR. CHIU, SUNNYSIDE PEOPLE THAT HAPPEN AND JUST WANTED TO

1 REMIND THE COURT OF THAT.

2 THE LAST THING I THOUGHT MIGHT SUGGEST THE PARTIES GO
3 BACK TO JAMS AND SEE JUDGE SMITH AT SOME POINT. MAYBE IT'S
4 AFTER WE'VE FILED, IF THE COURT BELIEVES WE NEED TO FILE A
5 SUPPLEMENTAL PLEADING AFTER WE HAD A STATUS CONFERENCE, BUT
6 DOING THAT I THINK WOULD BE --

7 THE COURT: YOU'RE CERTAINLY FREE TO DO THAT ANYWAY,
8 YOU DON'T HAVE TO WAIT FOR THE AFOREMENTIONED. IT WOULD SEEM
9 TO ME TO BE A GOOD IDEA.

10 MR. BUNZEL: OKAY.

11 THE COURT: OKAY.

12 MR. BUNZEL: THANK YOU.

13 THE COURT: THANK YOU.

14 MR. BURNS: THANK YOU.

15
16 (PROCEEDINGS ADJOURNED.)
17
18
19
20
21
22
23
24
25

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CERTIFICATE OF REPORTER

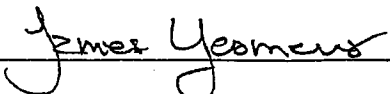
I, THE UNDERSIGNED, HEREBY CERTIFY THAT THE FOREGOING PROCEEDINGS WERE REPORTED BY ME, A CERTIFIED SHORTHAND REPORTER, AND WERE THEREAFTER TRANSCRIBED UNDER MY DIRECTION INTO TYPEWRITING; THAT THE FOREGOING IS A FULL, COMPLETE AND TRUE RECORD OF SAID PROCEEDINGS.

I FURTHER CERTIFY THAT I AM NOT OF COUNSEL OR ATTORNEY FOR EITHER OR ANY OF THE PARTIES IN THE FOREGOING PROCEEDINGS AND CAPTION NAMED, OR IN ANY WAY INTERESTED IN THE OUTCOME OF THE CAUSE NAMED IN SAID CAPTION.

THE FEE CHARGED AND THE PAGE FORMAT FOR THE TRANSCRIPT CONFORM TO THE REGULATIONS OF THE JUDICIAL CONFERENCE.

FURTHERMORE, I CERTIFY THE INVOICE DOES NOT CONTAIN CHARGES FOR THE SALARIED COURT REPORTER'S CERTIFICATION PAGE.

IN WITNESS WHEREOF, I HAVE HEREUNTO SET MY HAND THIS 30TH DAY OF MAY, 2007.



JAMES YEOMANS, CSR, RPR

RJN 308

EXHIBIT V

1
2
3
4
5
6 UNITED STATES DISTRICT COURT
7 NORTHERN DISTRICT OF CALIFORNIA

8
9 SUNNYSIDE DEVELOPMENT COMPANY, LLC,

10 Plaintiff,

11 v.

No. C 05 0553 MHP

12 OPSYS LIMITED,

13 Defendants,

14
15 **MEMORANDUM & ORDER**
16 **Re: Plaintiff's Motion to Add**
17 **Cambridge Display Technology, Inc.**
18 **as a Party to Action and Judgment**

19 Plaintiff Sunnyside Development Company, LLC ("plaintiff" or "Sunnyside") filed this
20 breach of contract action against defendant Opsys Limited ("defendant" or "Opsys Ltd.") in the
21 California Superior Court for the County of Alameda on December 14, 2004. Defendant removed
22 the action to this court on February 7, 2005. The matter proceeded to jury trial on February 21,
23 2007. On March 9, 2007 the jury returned a verdict in favor of plaintiff. Plaintiff now moves
24 pursuant to Federal Rules of Civil Procedure 25(c) and 69(a) to add Cambridge Display Technology,
25 Inc. ("CDT, Inc.") as a party to the action and judgment. Having considered the parties' arguments
26 and submissions, and for the reasons stated below, the court enters the following memorandum and
27 order.
28

BACKGROUND

The factual background of this action is set forth in this court's order on defendant's motion
for summary judgment. Sunnyside Dev. Co. v. Opsys Ltd., No. C 05 0553 MHP, 2007 WL 419865

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(N.D. Cal. Feb. 6, 2007) (Patel, J.). The court addresses the relevant procedural and factual background below.

I. CDT, Inc.'s History in this Action¹

Plaintiff filed this action on December 14, 2004, in Alameda Superior Court, naming as defendants Opsys Limited and CDT Limited, a subsidiary of CDT, Inc. Both defendants in that action jointly removed the suit to this court on February 5, 2007. The complaint alleged breach of contract and fraud in the inducement against both defendants. Defendants subsequently moved to dismiss the complaint. By order dated April 22, 2005, this court granted the motion in part and denied the motion in part, granting plaintiff "leave to and its complaint for the purpose of alleging facts sufficient to establish a fraud claim as to both defendants and establishing CDT's liability for breach of contract." Docket Entry 20. at 6.

Plaintiff filed its First Amended Complaint on May 11, 2005, again naming Opsys Limited and CDT Limited as defendants and asserting claims for fraud and breach of contract. Docket Entry 21. Defendants subsequently moved for partial dismissal. By order dated August 8, 2005 this court granted the motion, holding that plaintiff's claims for breach of contract against defendant CDT and its claims for fraud against both defendants were dismissed with prejudice. Docket Entry 39 at 10.

On November 2, 2005 plaintiff filed a Motion for Leave to File a Second Amended Complaint and/or to Join a Related Party as Successor-in-Interest. Docket Entry 48. The motion sought to add CDT, Inc. as a successor-in-interest to Opsys Limited pursuant to Federal Rule of Civil Procedure 25(c). Id. at 1. In ruling on plaintiff's motion the court declined to engage in the merits of plaintiff's Rule 25(c) motion on the grounds that joinder of CDT, Inc. at that time was premature. Docket Entry 57 at 7. Accordingly, the court denied plaintiff's motion for leave to add CDT, Inc. as party without prejudice, "subject to renewal if and when the primary liability of Opsys Limited is established." Id. The court granted plaintiff's motion for leave to file a second amended complaint. Id.

1 Plaintiff now renews its Rule 25(c) motion, and additionally seeks to add CDT, Inc. as a
2 party pursuant to Rule 69(a). Opsys Limited and CDT, Inc. have each filed separate oppositions to
3 plaintiff's motion.

4
5 II. Factual Background²

6 Plaintiff asserts that CDT, Inc. has succeeded to the assets and business of defendant, and
7 that CDT, Inc. litigated this case on defendant's behalf. Plaintiff's contention is based on an
8 elaborate series of transactions in 2002 in 2004 involving CDT, Inc., Opsys Limited, and
9 subsidiaries of both companies. While the parties dispute the legal significance of these
10 transactions, the basic facts are largely undisputed.

11 Opsys Limited had two business lines in 2002: research into dendrimer materials, based in
12 the UK, and pilot manufacturing of displays based on small molecule emitters based in Fremont,
13 California. The lease and property at issue in this litigation involved Opsys Limited's pilot
14 manufacturing operations only. Opsys Limited was in serious financial trouble in 2002, having £17
15 million in liabilities. Bunzel Dec., Exh. M at 17-18. Opsys searched for financing and discovered
16 that potential investors were interested only in one business line or the other. No investor would
17 invest in both operations. Accordingly, Opsys Limited decided to split its operations and fund each
18 one separately. As part of the process of "spinning off" Opsys Limited's California operations,
19 defendant entered into the Assignment at issue in this case.

20 By late 2002, CDT, Inc. had been identified as a potential financing partner. According to
21 defendant and CDT, Inc., however, CDT, Inc. was not interested in Opsys Limited's California
22 operations, and would not engage in any transaction involving that business, its associated liabilities,
23 or its obligations under the lease. Fyfe Dec. ¶ 7. As a general matter, CDT, Inc. is a research and
24 design company and had no interest in manufacturing operations. Id. CDT, Inc. made it clear to
25 Opsys that it had no interest in the California assets and business, and that any deal would require a
26 clean separation of the US operations from the UK operations. Id. ¶ 8. Opsys agreed to this
27 arrangement.

28

1 On October 23, 2002 Opsys Limited struck a deal to sell interests in its intellectual property
2 related to dendrimer OLED technology and its UK operations to CDT, Inc., which at that time was
3 called CDT Acquisition Corp. Bunzel Dec., Exhs. A & B. As part of this transaction, Opsys
4 Limited transferred all of its UK assets and operations into a subsidiary known as Opsys UK.
5 Bunzel Dec., Exh. A at 5 of 116, clause (F). CDT, Inc. paid Opsys Limited \$2.5 million in exchange
6 for 16% of the shares of Opsys UK. Ainslie Dec., Exh. B at 80 of 99. As part of this deal, CDT
7 Limited, a subsidiary of CDT, Inc., was granted management control of Opsys UK and 98% of
8 Opsys UK's profits, if any. Bunzel Dec. Exh. A at 22 of 116 clause 7. Opsys Limited received an
9 additional \$2 million from CDT Limited for a license of its technology. Id. at 21 of 116 clause
10 5.1(iii) & 32 of 116 clause 14.2.

11 The 2002 transaction additionally included put and call options. Id. at 16–20 of 116 clause 3
12 & 25–30 of 116 clause 9. The transaction gave CDT, Inc. a call option to purchase the remaining
13 84% of shares in Opsys UK, which were at that time owned by Opsys Limited. The agreement also
14 contained two put option provisions which gave Opsys Limited's shareholders the right to require
15 CDT, Inc. to purchase all shares of Opsys Limited if certain conditions were met. Among the
16 conditions were that Opsys Limited's liabilities could not exceed \$1.25 million, that Opsys
17 Limited's share ownership in Opsys UK was its only material asset, that the option exercise price
18 would be reduced by the value of the aggregate current liabilities, and that CDT, Inc. would
19 withhold from the exercise price the amount of all contingent liabilities until the liabilities
20 materialized or until the statute of limitations expired. Id. at 26 of 116 clause 9.4, 27 of 116 clause
21 9.11(a), 28 of 116 clause 9.12; Bunzel Dec., Exh. E at 81 of 99. Opsys Limited received an
22 additional \$500,000 for the call option. Id. at 16 of 116 § 3.1. Opsys Limited therefore received a
23 total of \$5 million in cash through the October 2002 transaction, and the value of the options
24 exceeded the value of the assets transferred to Opsys UK as set forth in Opsys Limited's September
25 2002 Report and Financial Statements. Bunzel Dec., Exh. M.

26 Finally, the 2002 transactions involved a number of warranties by Opsys. Namely, that
27 Opsys was not a party to any contract that could not readily be performed by it on time; that it was
28

1 not a party to, nor did it have any liability under, any lease; that it was not a party to any contract
2 valued at more than £10,000 or of one year or greater duration; and that it was not under any
3 obligation in respect of unaccrued or undisclosed liabilities in connection with its US operations.
4 Bunzel Dec. ¶ 3, Exh. A at 59–60. A disclosure letter dated October 23, 2002 by Opsys Limited
5 explicitly states that the lease had been assigned to Opsys US. Black Dec., Exh. A. CDT, Inc.
6 asserts that this elaborate transaction structure was designed to minimize tax liability rather than
7 disadvantage plaintiff. Black Dec. ¶¶ 7–13.

8 The 2002 transaction did not involve any assets, including intellectual property, related to
9 Opsys Limited’s US operations. Rather, Opsys Limited transferred all of its US assets to a separate
10 subsidiary, Opsys US, and sought financing for that company as well. Opsys Limited was
11 apparently unable to secure financing for Opsys US. As part of this transaction, Opsys Limited
12 attempted to assign the Lease at issue in this litigation to Opsys US, an assignment which the jury in
13 this action subsequently found to have been ineffective.

14 In late 2002, Opsys UK was renamed CDT Oxford Limited. Bunzel Dec., Exh. C at 68 of
15 149; Fyfe Dec. ¶ 9. CDT Oxford Limited remained in operation, being managed by CDT Limited,
16 until mid-2003. Beginning in July 2003, the CDT Oxford Limited facility in Oxford was gradually
17 shut down, and most of its employees were laid off. *Id.* ¶ 10. Via press release, CDT, Inc.
18 announced that it would close the CDT Oxford Limited facility and “move key scientists to
19 Cambridge as part of a new ‘High Efficiency Materials’ research group,” consolidating the Oxford
20 and Cambridge resources “under one roof.” Bunzel Dec., Exh. F. CDT, Inc. asserts that this new
21 materials research group was a fundamental transformation of the pre-existing operations. Fyfe Dec.
22 ¶¶ 9–10. Additionally, CDT, Inc. maintains that Opsys Limited and Opsys UK were separate legal
23 entities that at all times observed the proper corporate formalities. Black Dec. ¶¶ 14–18.

24 Subsequent to the October 2002 transaction, disputes arose between Opsys and CDT, Inc.
25 regarding the transaction and, at one point, Opsys Limited considered legal action against CDT, Inc..
26 Black Dec. ¶¶ 19–22. The companies resolved their dispute via a settlement agreement entered into
27
28

1 on August 3, 2004, which was amended via a second agreement dated December 14, 2004
2 (coincidentally, the date this action was filed in Alameda Superior Court).

3 In the meantime, CDT, Inc. filed a prospectus with the SEC to issue public shares. The
4 prospectus identified CDT, Inc.'s acquisition of the 16% interest in CDT Oxford Limited and the
5 right to control its operations as a key element of its research and development value, and stated that
6 up to \$1.2 million of the IPO funds would be used to pay Opsys Limited's liabilities. Bunzel Dec.
7 Exh. C at 29 of 149, 40 of 149, 58 of 149, 68 of 149. As part of the settlement agreement between
8 CDT, Inc. and Opsys Limited, CDT, Inc. exercised its options and acquired 100% of the stock of
9 Opsys Limited in exchange for shares of newly public CDT, Inc. stock valued at \$9.8 million.
10 Ainslie Dec., Exh. B at 82 of 99. CDT, Inc. valued the acquisition of CDT Oxford Limited at \$26.9
11 million. *Id.* at 80 of 99; Black Dec. ¶ 25. Black Dec. ¶¶ 21–22, Bunzel Dec. ¶ 6; Exh. D at 4–5. As
12 part of this transaction, it was agreed that a portion of the CDT, Inc. stock offered in exchange for
13 the Opsys Limited stock would indemnify CDT, Inc. for undisclosed or contingent liabilities.
14 Bunzel Dec., Exh. D at 43 of 58 § 4(e). CDT, Inc. asserts that exercising this option was, again, a
15 matter of tax benefits. Black Dec. ¶ 25.

16 As part of the 2004 transaction, 133,938 shares of CDT, Inc. stock valued at a total of
17 \$1,607,256 were held back to cover known and identified liabilities. Bunzel Dec., Exh. D at 6
18 (clause 1.1(g)); Black Dec. ¶ 27. The list of identified liabilities did not include the lease. Bunzel
19 Dec., Exh. D at 20–21. Additionally, 422,610 shares of CDT, Inc. stock, valued at \$5,071,320 went
20 into escrow as security for contingent and unidentified liabilities. Black Dec. ¶ 28, Exh. D at 9–10
21 clause 1.1(h). The remaining CDT, Inc. shares constituting the payment for the put option were
22 distributed to Opsys management to be distributed between management and shareholders. Black
23 Dec. ¶ 29, Exh. B. CDT, Inc. claims that no shares have yet been distributed to shareholders, and
24 will not be until other creditors are paid off.

25 During the same month as CDT, Inc.'s IPO, plaintiff filed this action. Since that time, Opsys
26 Limited and CDT Oxford Limited have applied for, and obtained, substantial patents related to CDT,
27 Inc.'s research and development business. Bunzel Dec. ¶ 20; Exh. O. These patents are assigned to
28

CDT Oxford Limited or CDT Oxford Limited and CDT, Inc. Id. Plaintiff asserts that CDT, Inc. directed this litigation and advanced the funds to defend itself, and that its representatives “presided over the trial,” citing evidence that attorneys and other representatives from CDT, Inc. were present at certain proceedings in the instant action. Bunzel Dec. ¶ 19, Exh. N, ¶¶ 12–13, Exhs. H & I.

In May 2005, while this action was pending, CDT, Inc. transferred its 16% interest in CDT Oxford Limited and its 100% interest in Opsys Limited to CDT Limited. Additionally, Opsys Limited transferred its 84% interest in CDT Oxford Limited to CDT Limited. Accordingly, CDT Oxford Limited and Opsys are now wholly owned subsidiaries of CDT Limited and indirect subsidiaries of CDT, Inc. Black Dec. ¶¶ 33–38. CDT, Inc. claims that these transfers were planned in late 2004, prior to the initiation of this lawsuit. Black Dec. ¶¶ 24–25. At the time of these transfers, CDT Limited, rather than CDT, Inc., was a defendant in this action.

Subsequent to the return of the jury verdict in this action in favor of plaintiff, CDT, Inc. issued a press release stating that Opsys Limited does “not have any assets, nor does it have any intellectual property rights which are relevant to CDT’s business,” and that CDT, Inc. did not intend to assist Opsys Limited in funding the litigation. Bunzel Dec., Exh. J. The present market capitalization value of CDT, Inc. is over \$100 million.

LEGAL STANDARD

Federal Rule of Civil Procedure 25(c) provides, in relevant part: “In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party.” Rule 25(c) is purely procedural and does not confer any substantive rights. Hilbrands v. Far East Trading Co., Inc., 509 F.2d 1321, 1323 (9th Cir. 1975). Accordingly, the issue of successor liability in the context of corporate mergers and acquisitions is a matter of state law. LiButti v. United States, 178 F.3d 114, 124 (2d Cir. 1999).

1 DISCUSSION

2 I. Applicability of Rule 25(c)

3 As a preliminary matter, defendant asserts that Rule 25(c) does not apply at all in these
4 circumstances, as cases have held that Rule 25(c) applies only after a transfer of interest with respect
5 to the subject matter of the suit. Ignoring the rule that the substantive law of successor liability
6 pursuant to Rule 25(c) is the law of the forum state, defendants cite a number of federal authorities
7 from other circuits in support of this position. Oddly enough, the authorities cited by defendant
8 generally stand for the proposition that successor liability is appropriate where the subject matter of
9 the action has been transferred *or* the purported successor has acquired all of the defendant's assets
10 and liabilities. Because plaintiff posits the latter theory, these authorities do not support a
11 categorical bar on successor liability due to the fact that the lease interest was not specifically
12 transferred from Opsys Limited to CDT, Inc.. As discussed below, California state law provides for
13 several circumstances in which successor liability may attach following a general asset transfer.

14 Additionally, plaintiffs rely on an unpublished decision from this district in support of their
15 claim that Rule 25(c) does not apply to stock transfers between shareholders and parent
16 corporations. Equal Employment Opportunity Comm'n v. Pan Am. World Airways, Inc., No.
17 C-81-3636 RFP, 1987 U.S. Dist. LEXIS 15182 (N.D. Cal. Dec. 1, 1987) (Peckham, C.J.). That case
18 held only that successor liability was not available under those particular facts. Plaintiffs cite no
19 further support for their proposed categorical bar on successor liability under Rule 25(c) for parent
20 company acquisitions. As discussed below, however, acquisitions which involve only stock
21 purchases rather than asset purchasers cannot give rise to successor liability, regardless of whether
22 the purchaser is a parent of the seller.

23
24 II. Successor Liability

25 Plaintiff cites Rule 25(c) and Rule 69(a) as bases for the imposition of successor liability.
26 Because plaintiff appears to consolidate these two rules into a single inquiry, the court will do the
27 same.³

28

The parties appear to be in agreement that California substantive law governs the issue of successor liability for the purposes of this motion.⁴ California law generally provides that, with a few exceptions, successor liability does not attach in the context of an asset purchase:

“As typically formulated the rule states that the purchaser [of corporate assets] does not assume the seller’s liabilities unless (1) there is an express or implied agreement of assumption, (2) the transaction amounts to a consolidation or merger of the two corporations, (3) the purchasing corporation is a mere continuation of the seller, or (4) the transfer of assets to the purchaser is for the fraudulent purpose of escaping liability for the seller’s debts.”

Beatrice Co. v. State Bd. of Equalization, 6 Cal. 4th 767, 778 (1993) (quoting Ray v. Alad Corp., 19 Cal. 3d 22, 28 (1977)). “Eliminating the exceptions requires disproving at least one element of each exception or showing that at least one such element cannot be established.” Fisher v. Allis-Chalmers Corp. Prod. Liab. Trust, 95 Cal. App. 4th 1182, 1188 (2002). This is obviously a highly factual inquiry that does not lend itself well to determination without a trial or, at the very least, an evidentiary hearing. Id. (stating that the successor liability exceptions are “extremely fact sensitive”) (internal quotations omitted); Luxliner P.L. Exp., Co. v. RDI/Luxliner, Inc., 13 F.3d 69, 72–73 (3d Cir. 1993) (holding that where a Rule 25(c) decision “effectively imposes liability,” the court should conduct an evidentiary hearing unless the standards for summary judgment have been met).

Before turning to the exceptions, however, it is worth noting that successor liability under California law requires the purchase of *assets*, not merely the purchase of stock. Potlatch Corp. v. Superior Court, 154 Cal. App. 3d 1144, 1150–51 (1984). In establishing this rule, the California Court of Appeal made it clear that this is not simply a matter of form over substance. As the court explained:

[T]he fact that Potlatch did not acquire the physical assets of Speedspace and its Summer Bell division and continue the business of Summer Bell as a part of its own business but, instead, acquired the capital stock of Speedspace is no mere matter of form. It implicates fundamental concepts and principles of California and United States law: corporate identity and shareholder immunity.

1 Id. at 1150. The court further explained that when a corporation acquires only capital stock rather
2 than assets, it becomes a “sole shareholder” of the acquired company, and that “[i]t is fundamental
3 that a shareholder owns no part of the specific property of the corporation.” Id.

4 Here, the record discloses a single relevant transfer of business assets: the transfer of Opsys
5 Limited’s UK assets and operations to Opsys UK, which later became CDT Oxford Limited. CDT,
6 Inc. never acquired these assets, but rather purchased management rights, licenses, and an interest in
7 the profits. Even if this latter transaction may be considered an asset transfer, which is highly
8 dubious, the “assets” were transferred to CDT Limited, not CDT, Inc. Transfer to an “intervening
9 corporation” is not sufficient for successor liability to attach under California law. Katzir’s Floor &
10 Home Design, Inc. v. M-MLS.com, 394 F.3d 1143, 1151 (9th Cir. 2004). Furthermore, “[t]he mere
11 fact of sole ownership and control does not eviscerate the separate corporate identity that is the
12 foundation of corporate law.” Id. at 1149. Plaintiff makes no attempt to pierce the corporate veil
13 between CDT Limited and CDT, Inc. Accordingly, plaintiff’s attempt to impose successor liability
14 upon CDT, Inc. fails.

15 Assuming, however, that the transactions may be characterized as an asset transfer from
16 Opsys Limited to CDT, Inc., the court will consider whether any or the above exceptions applies.

17
18 A. Express or Implied Assumption

19 Plaintiff claims that, notwithstanding the express disclaimers of liability in the transactions
20 between Opsys and CDT, Inc., CDT, Inc. assumed the lease liabilities for a number of reasons.
21 CDT, Inc. understood that there was a risk of undisclosed contingent liabilities of Opsys Limited.
22 Because the lease was ultimately determined to be a liability of Opsys Limited (not having been
23 effectively assigned to Opsys US), plaintiff claims that the lease was a contingent liability assumed
24 by CDT, Inc..

25 In support of this claim, plaintiff asserts that CDT, Inc. has “invaded” the shares in escrow to
26 finance this litigation. Bunzel Dec. ¶ 11; Exh. G at 17–18 of 59. However, the passage of the SEC
27 filing that plaintiff cites in support of this position states only that the shares in escrow would be
28

1 forfeited to cover any loss or other costs that may incur to CDT, Inc. as a result of the claim. There
2 is nothing to suggest that CDT, Inc. "invaded" the escrow to "finance" this litigation. Rather, the
3 escrow shares were being used to cover a contingency as originally envisioned. The fact that CDT,
4 Inc. may have incurred some costs or losses as a result of a lawsuit involving one of its subsidiaries
5 does not amount to an assumption of the subsidiary's liability. In any case, the contingent liabilities
6 were ultimately the responsibility of Opsys Limited, not CDT, Inc., as indicated by the fact that
7 CDT, Inc. withheld consideration owed to Opsys Limited in order to satisfy the contingencies.
8 Plaintiffs have therefore failed to show that CDT, Inc. expressly or impliedly assumed the liabilities
9 associated with this litigation.

10
11 B. Consolidation or Merger

12 Plaintiff contends that the transaction between Opsys Limited and CDT, Inc. was a de facto
13 consolidation or merger. California courts consider the following five factors in determining
14 whether a transaction styled as an asset purchase is a de facto merger:

15 (1) was the consideration paid for the assets solely stock of the
16 purchaser or its parent; (2) did the purchaser continue the same
17 enterprise after the sale; (3) did the shareholders of the seller become
18 shareholders of the purchaser; (4) did the seller liquidate; and (5) did
19 the buyer assume the liabilities necessary to carry on the business of
20 the seller?

21 Marks v. Minn. Mining & Mfg. Co., 187 Cal. App. 3d 1429, 1436 (1986). Plaintiff claims that all
22 five factors favor a finding of de facto merger.

23 First, Cambridge acquired Opsys Limited by issuing 797,965 shares of stock and an
24 additional 19,736 shares to two former Opsys Limited directors. Ainslie Dec., Exh. B. Plaintiff
25 claims that the \$5 million in cash paid in 2002 was for a controlling interest in an affiliate, as
26 distinguished from the 100% stock deal in 2004. Second, plaintiff claims that CDT, Inc.'s
27 acquisition of CDT Oxford Limited, along with full management control over CDT Oxford Limited
28 beginning in October 2002, amounts to a continuation of Opsys Limited's enterprise. Third,
plaintiff claims that the Settlement Agreement and Amended Agreement each establish that the

1 shares of CDT, Inc. will be distributed among Opsys Limited's shareholders, Bunzel Dec., Exh. D,
2 and that the 2004 10-K describes the ultimate acquisition through a 100% stock deal. Ainslie Dec.,
3 Exh. B. Fourth, plaintiff asserts that Opsys Limited has no remaining assets and that the company
4 has therefore liquidated. Ainslie Dec. ¶ 9, Exh. C; Bunzel Dec., Exhs. F & J. Finally, plaintiff
5 argues that CDT, Inc. expressly assumed the operational liabilities of Opsys UK, which held the
6 assets of Opsys Limited. Bunzel Dec., Exh. A at 23 of 116, § 7.5. Regarding this last point,
7 defendant offers an overly ambitious reading of the documentary evidence. The clause in question
8 states that CDT, Inc. would be responsible for liabilities arising from *its management* of Opsys UK,
9 not any pre-existing liabilities.

10 Defendant, in response, focuses on the 2002 transaction, stating that Opsys Limited's assets
11 in the UK were transferred to Opsys UK rather than CDT, Inc., and that Opsys Limited received
12 cash consideration (the \$5 million) rather than stock only. Defendant additionally argues that the
13 2004 transaction was not a de facto merger because it did not involve a sale or transfer of assets.
14 Rather, CDT, Inc. acquired only capital stock of Opsys Limited, rendering Opsys Limited a wholly
15 owned subsidiary of CDT, Inc.. The parent-subsidary structure, according to defendant, insulates
16 CDT, Inc. from Opsys Limited's liabilities.

17 CDT, Inc. further adds that the former Opsys shareholders have not yet received any CDT,
18 Inc. stock, with the exception of the settlement of two personal claims. Black Dec. ¶ 29. CDT, Inc.
19 additionally states that no shares will be distributed until certain superior creditors are paid. Id.
20 This undercuts plaintiff's assertion that the operations of Opsys Limited merely switched hands, as
21 in such circumstances courts expect the shares of the purchaser's stock to be "promptly distributed
22 to the seller's shareholders in conjunction with the seller's liquidation." Marks, 187 Cal. App. 3d at
23 1435. Additionally, CDT, Inc. states that Opsys Limited has not liquidated, Black Dec. ¶ 35, and
24 denies that CDT, Inc. assumed liabilities as discussed above.

25 Analyzing plaintiff's theory, it is clear that plaintiff is selectively characterizing the 2002 and
26 2004 transactions as a single transaction in certain respects and as separate transactions in other
27 respects. For example, in an effort to escape the \$5 million in cash consideration paid in 2002,
28

1 plaintiff characterizes those funds as going to a controlling interest in an affiliate. However, plaintiff
2 conflates CDT, Inc.'s acquisition of Opsys Limited's UK subsidiary with the ultimate acquisition of
3 Opsys Limited itself, notwithstanding the fact that Opsys Limited remained an independent company
4 for two years after CDT, Inc. acquired Opsys UK. Because the Opsys UK deal involved cash
5 consideration, that cash consideration must be considered in evaluating the acquisition of Opsys
6 Limited. Additionally, CDT, Inc. has submitted evidence that it transformed Opsys UK's operations
7 subsequent to the acquisition. Fyfe Dec. ¶¶ 9–11. This is therefore simply not a situation in which a
8 pre-existing business continued following its acquisition by a separate entity.

9 Furthermore, a de facto merger requires a showing that the purchaser paid inadequate
10 consideration for the seller's assets. Franklin v. USX Corp., 87 Cal. App. 4th 615, 625 (2001) ("The
11 crucial factor in determining whether a corporate acquisition constitutes either a de facto merger or a
12 mere continuation is the same: whether adequate cash consideration was paid for the predecessor
13 corporation's assets."). California courts justify this rigid rule by citing the need for predictability in
14 the field of corporate asset transfers. Id. As discussed more fully below, plaintiff has failed to make
15 any showing that CDT, Inc. paid inadequate consideration for Opsys Limited's assets.

16 Accordingly, plaintiff has failed to establish that CDT, Inc.'s acquisition of Opsys Limited
17 was a de facto merger for the purposes of successor liability.

18
19 C. Continuation

20 Under California law, a corporation acquiring the assets of another corporation is the latter's
21 mere continuation only upon a showing that "(1) no adequate consideration was given for the
22 predecessor corporation's assets and made available for meeting the claims of its unsecured
23 creditors," or "(2) one or more persons were officers, directors, or stockholders of both
24 corporations." Ray, 19 Cal. 3d at 29. Plaintiff claims that the research and development business
25 activities of Opsys Limited/Opsys UK continued under one roof after the Cambridge acquisition.
26 Bunzel Dec., Exh. F. Additionally, plaintiff claims that the consideration was inadequate because
27 Opsys Limited has been left with no assets and therefore unable to pay its debt to plaintiff. See
28

1 Katzir's Floor & Home Design, 394 F.3d at 1151. Regarding continuity of personnel, Opsys
2 Limited's financial controller became a director of the surviving subsidiary Opsys UK, which
3 became CDT Oxford Limited, and Opsys Limited CEO Michael Holmes became an observer on the
4 CDT, Inc. board. Bunzel Dec., Exh. P. Finally, plaintiff claims that Opsys Limited shareholders
5 became CDT, Inc. shareholders under the terms of the settlement agreement. Bunzel Dec., Exh. D.

6 Apart from the two specific requirements delineated in Ray, California courts generally hold
7 that successor liability based on continuation is not established "where the selling and purchasing
8 corporations were completely separate and distinct entities both before and after sale." Tidewater
9 Oil Co. v. Workers' Comp. Appeals Bd., 67 Cal. App. 3d 950, 955-56. Here, it is undisputed that
10 CDT, Inc. and Opsys Limited remain separate legal entities.

11 Turning to the "crucial factor" of adequate consideration, Franklin, 87 Cal. App. 4th at 625,
12 plaintiff must show more than Opsys Limited's current inability to pay its debts. Rather, "there must
13 be a causal relationship between a successor's acquisition of assets (i.e., inadequate consideration),
14 and the predecessor's creditors' inability to get paid." Katzir's Floor & Home Design, 394 F.3d at
15 1151 (citing Monarch Bay II v. Prof'l Serv. Indus., Inc., 75 Cal. App. 4th 1213 (1999)). Where it is
16 a "lack of sufficient assets that deprive[s] the predecessor's creditors of their remedy, not the
17 acquisition of the predecessor's assets by another entity," successor liability cannot attach based on a
18 theory of mere continuation. Id. See also Franklin, 87 Cal. App. 4th at 627 (holding that inadequate
19 consideration requires a showing that there were insufficient assets available at the time of the
20 acquisition). In other words, the inability to pay is not itself the basis for finding successor liability.
21 Over and above Opsys Limited's inability to pay, plaintiff must specifically point to inadequate
22 consideration at the time of the purported asset transfer. Although plaintiff asserts that the \$5
23 million cash consideration was less than the value of Opsys Limited's *liabilities*, plaintiff makes no
24 argument that the payment in exchange for Opsys Limited's approximately £2 million worth of
25 *assets* was objectively inadequate. In addition to this cash consideration, CDT, Inc. paid over \$11
26 million worth of stock when it finally acquired Opsys Limited as a result of the settlement
27 agreement. Plaintiff cites no authority for the proposition that in order for consideration to be
28

1 sufficient the purchaser must pay off the seller's debts, rather than simply compensate the seller for
2 its assets. Because CDT, Inc. paid consideration which was adequate in light of the assets it
3 received, plaintiff has failed to demonstrate inadequate consideration.

4 Failure to prove inadequate consideration is fatal to plaintiff's claim of mere continuation.
5 However, defendants further attack the sufficiency of plaintiff's evidence regarding the personnel
6 issue. Although the court in Ray required "one or more" persons switching from one company to
7 the other, subsequent decisions have required a more substantial continuity of personnel. In
8 Franklin, 87 Cal. App. 4th at 627, the court noted that some of the cases underlying the holding in
9 Ray "involved near complete identity of ownership, management or directorship after the transfer."
10 None of these cases involved a situation where "only a single person with minimal ownership
11 interest in either entity remained as an officer and director." Id.; see also Maloney v. American
12 Pharm. Co., 207 Cal. App. 3d 282, 288 (1988) ("a mere continuation typically involves continuity of
13 employees beyond [a] single officer"). Here, plaintiffs identify only two individuals allegedly
14 involved in both companies. One became a board member of CDT Oxford Limited, not CDT, Inc.
15 itself, while another became an observer on the CDT, Inc. board. This is hardly the level of
16 personnel continuity that courts look for when finding that an asset transfer amounts to a mere
17 continuation.

18 In sum, plaintiffs have not shown that the transfer of assets from Opsys Limited to CDT, Inc.
19 was a mere continuation of Opsys Limited's operations.

20
21 D. Fraudulent Purpose

22 In support of its contention that the CDT transaction was entered into for the purpose of
23 avoiding Opsys Limited's debts, including its lease liabilities, plaintiff cites the following passage
24 from CDT, Inc.'s 2004 10-K:

25 The terms of the Transaction Agreement were entered into by the
26 Company so that it could gain control of an economic interest in the
27 UK assets and operations of Opsys (which had been transferred to
28 Opsys UK immediately prior to the transaction) in such a manner to
avoid acquiring any interest in any other assets or liabilities of Opsys.

1 Ainslie Dec. ¶ 8, Exh. B at 81 of 99. This statement is unremarkable. It is undisputed that CDT,
2 Inc. at no time had any interest in Opsys Limited's US operations. Accordingly, the transaction was
3 structured to avoid both the assets and liabilities of the Opsys Limited's US business—in other
4 words, the entire operation. There is no indication that Opsys Limited's attempts to maintain its UK
5 operations by seeking financing from CDT, Inc. was specifically designed to dodge the liabilities of
6 the US operations. Rather, Opsys Limited unsuccessfully sought a financing partner for Opsys US
7 at the same time it was working out its arrangement with CDT, Inc. regarding Opsys UK.

8 Furthermore, it is significant that this alleged fraudulent scheme involved two separate
9 transactions separated by two years. The 2002 transaction, which ultimately resulted in CDT
10 Limited acquiring control over Opsys UK, was supported by its own set of legitimate business
11 reasons. Only two years later did CDT, Inc. acquire Opsys UK by purchasing Opsys Limited
12 through a settlement agreement. Each transaction was supported by adequate consideration, and
13 treating them as a consolidated fraudulent scheme is unwarranted.

14 Plaintiffs additionally point to the fact that defendants transferred CDT Oxford Limited from
15 Opsys Limited to CDT Limited in 2005, while this action was pending, leaving Opsys Limited with
16 no assets. Bunzel Dec. ¶ J. CDT, Inc. claims that these transfers were planned in late 2004, prior to
17 the initiation of this lawsuit. Black Dec. ¶¶ 24–25. At the time of these transfers, CDT Limited,
18 rather than CDT, Inc., was a defendant in this action. *Id.* An asset transfer between defendants is
19 hardly an attempt to thwart a plaintiff's ability to collect. These facts do not support a finding of
20 fraudulent transfer.

21 Finally, plaintiff argues that the consideration provided in 2002 was insufficient to pay off
22 Opsys Limited's £17 million debts. As discussed above, however, it is undisputed that Opsys
23 Limited received adequate consideration for the assets acquired, if any, by CDT, Inc. Accordingly,
24 this outstanding debt is not a basis for fraudulent transfer.

25 The parties cite California's Uniform Fraudulent Transfer Act, California Civil Code sections
26 3439 *et seq.*, as the controlling authority regarding whether successor liability applies based on the
27 fraudulent transfer exception. A prerequisite for the various forms of fraudulent transfer is that the
28

1 acquiring party pays inadequate consideration. Because plaintiff has failed to demonstrate this with
2 respect to any of the transactions at issue, the fraudulent transfer exception does not apply.


3 In sum, plaintiff has clearly not established that CDT, Inc. should be added as a defendant
4 pursuant to Rule 25(c). At the very least, adding CDT, Inc. at this point would require discovery and
5 additional evidentiary proceedings. In light of the weakness of plaintiff's arguments, however, and
6 the undisputed facts in the record, the court holds as a matter of law that CDT, Inc. is not a proper
7 defendant in this action.⁵

8
9 CONCLUSION

10 For the reasons stated above, the court DENIES plaintiff's motion to add Cambridge Display
11 Technology, Inc. as a party.

12
13 IT IS SO ORDERED.

14
15
16 Dated: August 29, 2007


MARILYN HALL PATEL
United States District Court Judge
Northern District of California

ENDNOTES

1. The background facts related to the Cambridge Display Technology companies are taken from this court's previous orders and other docket entries.

2. The background facts are taken from the parties' declarations and submissions. Because defendant has moved to strike plaintiff's declarations, every effort has been made to cite to documentary evidence rather than the declarations themselves. To the extent that citation to declarations is necessary to fully set forth the salient facts, the court will rule on defendant's objections as needed.

3. The specific basis for plaintiff's motion is somewhat unclear. In citing Rule 69(a), plaintiff seems to raise, but never fully develops, a separate theory of alter ego liability in addition to successor liability under Rule 25(c). In light of this court's previous orders dismissing plaintiff's alter ego theories with prejudice, the court is skeptical as to whether such an argument would be viable, if it were properly raised. Furthermore, plaintiff acknowledges the need to show that CDT, Inc. controlled the litigation in order to establish alter ego liability pursuant to Rule 69(a), and has not done so. At best, plaintiff has shown some degree of involvement and interest on the part of CDT, Inc., which is not surprising in light of the fact that its subsidiary was being sued. In any case, because plaintiff's successor liability theory appears to be a species of alter ego liability, the court will focus on the specifically developed successor liability arguments.

4. Remarkably, a footnote in defendant's opposition brief claims that plaintiff failed to address the choice of law issue regarding successor liability. Plaintiff's memorandum of points and authorities, in fact, devotes almost two pages to this very issue, raising substantial arguments in favor of California law. Defendant deigns to discuss the California law on which plaintiff relies but "does not concede that California law, rather than Delaware law, UK law, or some other law, should apply." In light of defendant's failure to address the choice of law arguments in plaintiff's brief, the court will consider any choice of law arguments to be waived by defendant, and will assume that California law controls the issue of successor liability. In its separate brief, CDT, Inc. also attempts to preserve its challenge to the application of California law but assumes *arguendo* that California law applies.

5. CDT, Inc. additionally argues that plaintiff's instant motion is barred by the doctrine of laches. Because plaintiff's delay in bringing this motion is due in part to this court's previous order deferring the issue until after trial, the court finds that the doctrine of laches is inapplicable.

EXHIBIT W

(Rule 4.7)

Winding-Up Petition

Form 4.2

"A"



No. 357 of 2008.

IN THE HIGH COURT OF JUSTICE
COMPANIES COURT

IN THE MATTER OF

OPSYS LIMITED

(Registered No. 03426174)

AND IN THE MATTER OF THE INSOLVENCY ACT 1986



(a) Insert title of court

To (a)

THE HIGH COURT OF JUSTICE, COMPANIES COURT

(b) Insert full name(s) and
address(es) of petitioner(s)

The petition of (b)

SUNNYSIDE DEVELOPMENT LLC (Company Registration No. 199932510035,
U.S.A) C/O BEACHCROFT LLP, 100 FETTER LANE, LONDON EC4A 1BN

1. (c)

(c) Insert full name and
registered no. of company
subject to petition

OPSYS LIMITED

(hereinafter called "the company") was incorporated on

(d) Insert date of
incorporation

(d) 28/08/1997

under the Companies Act 1985

2. The registered office of the company is at (e)

(e) Insert address of
registered office

BUILDING 2020, CAMBOURNE BUSINESS PARK, CAMBRIDGESHIRE CB23 6DW

(f) Insert amount of nominal
capital and how it is divided

3. The nominal capital of the company is (f) £ 65,820 & \$2000

divided into ATTACHED shares of £0.1p each. The amount of the capital paid up

(g) Insert amount of capital
paid up or credited as paid up

or credited as paid up is (g) £ 42,312 & \$2000

4. The principal objects for which the company was established are as follows:

TO CARRY ON BUSINESS AS A GENERAL COMMERCIAL COMPANY

and other objects stated in the memorandum of association of the company

RJN 327

Form 4.2 contd.

(j) Delete as applicable 6. The company ⁽ⁱ⁾ ~~X~~/is not an insurance undertaking; a credit institution; an investment undertaking providing services involving the holding of funds or securities for third parties; or a collective investment undertaking as referred to in article 1.2 of the EC Regulation.

(k) Insert name of person swearing affidavit 7. For the reasons stated in the affidavit of ^(k) NICHOLAS BRAINSBY filed in support here of it is considered that the EC Regulation on insolvency proceedings ⁽ⁱ⁾ will ~~XXXX~~ apply ⁽ⁱ⁾ and that these proceedings will be ⁽ⁱ⁾ MAIN proceedings as defined in Article 3 of the EC Regulation

(l) Insert whether main, secondary or territorial proceedings

8. In the circumstances it is just and equitable that the company should be wound up
The petition(s) therefore pray(s) as follows:-
(1) that ^(c)
OPSYS LIMITED

may be wound up by the court under the provisions of the Insolvency Act 1986
or
(2) that such other order may be made as the court thinks fit

(m) If the company is the petitioner, delete "the company".
Add the full name and address of any other person on whom it is intended to serve this petition

Note: It is intended to serve this petition on ^(m)
[the company] ~~XXXX~~



RJN 328

5. (h)

(h) Set out the grounds on which a winding-up order is sought

THE COMPANY IS INDEBTED TO THE PETITIONER IN THE SUM OF U.S. \$4,853,017.00 WITH INTEREST THEREON AT A RATE OF 4.95 PER CENT PURSUANT TO A JUDGEMENT OBTAINED IN THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA IN THE CASE OF SUNNYSIDE DEVELOPMENT COMPANY LLC (PLAINTIFF) V OPSYS LIMITED (A UNITED KINGDOM COMPANY) (DEFENDANT) NO. C 05-00553 MHP. THE JUDGEMENT IS SET OUT BELOW:

"THIS ACTION CAME ON FOR TRIAL BEFORE THE COURT, THE HONOURABLE MARILYN HALL PATEL, UNITED STATES DISTRICT JUDGE, PRESIDING, AND THE ISSUES HAVING BEEN DULY TRIED BEFORE A JURY AND THE JURY HAVING DULY RENDERED ITS VERDICT,

IT IS HEREBY ORDERED AND ADJUDGED THAT THE PLAINTIFF, SUNNYSIDE DEVELOPMENT COMPANY LLC, RECOVER OF THE DEFENDANT OPSYS LIMITED, THE SUM OF \$4,853,017.00, WITH INTEREST THEREON AT THE RATE OF 4.95 PER CENT AS PROVIDED BY LAW, AND ITS COSTS OF ACTION."

THE PETITIONER HAS MADE APPLICATION TO THE COMPANY FOR PAYMENT OF THE DEBT IN ACCORDANCE WITH THE COURT JUDGEMENT AS SET OUT ABOVE. ON WEDNESDAY 5 DECEMBER 2007 AT 10.05 A.M. A STATUTORY DEMAND (FORM 4.1) WAS SERVED ON THE COMPANY VIA ITS SOLICITORS OSBORNE CLARKE AT APEX PLAZA, FORBURY ROAD, READING RG1 1AX WHO WERE AUTHORISED TO ACCEPT SERVICE ON THE COMPANY'S BEHALF. NEITHER THE COMPANY NOR ITS SOLICITORS HAVE RESPONDED TO THE STATUTORY DEMAND FOR PAYMENT AND THE COMPANY HAS FAILED AND NEGLECTED TO PAY OR SATISFY THE SAME OR ANY PART THEREOF.

THEREFORE THE PETITIONER CONCLUDES THAT THE COMPANY IS INSOLVENT AND UNABLE TO PAY ITS DEBTS AND IN THE CIRCUMSTANCES IT IS JUST AND EQUITABLE THAT THE COMPANY SHOULD BE WOUND UP.



RJN 329

Endorsement

This petition having been presented to the court

on 15/1/08 will be heard at ⁽¹⁾ [Royal Courts of Justice,

Strand, London, WC2A 2LL] [XXX]

(n) Insert name and address of Court

[illegible]

on:

on: 30th April 2008
Date _____

(o) Insert name and address of District Registry

Time 10:30 hours

(or as soon thereafter as the petition can be heard)

The solicitor to the petitioner is:-

Name MIKE STUBBS

Address BEACHCROFT LLP, 100 FETTER LANE, LONDON EC4A 1BN

Telephone no 020 7242 1011

Reference NTB/ARMM SUN119-0507298

(i) ~~Whose London Agent was~~

Name _____

Address _____

Telephone no _____

Reference _____

R.JN 330

Classes of Shares: OPSYS LIMITED

Ordinary 0.1p Shares

A Preference 0.1 cent Shares

B Preference 0.1p Shares

C Preference 0.1p Shares

D Preference 0.1p Shares

E Preference 0.1p Shares

A Ordinary 0.1p Shares

B 0.1p Shares

C Ordinary 0.1p Shares

Deferred 0.1p Shares

RJN 331